No. 82-461

In the Supreme Court of the United States

October Term, 1982

Office Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

KEATON G. DUCKWORTH, District Judge, 26th Judicial District, IRL SHUTTS, and ROBERT ANDERSON and BETTY ANDERSON, individually, and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770, and 770A,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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QUESTION PRESENTED

Is a state court in a class action prohibited by basic principles of federalism and the Due Process Clause of the Fourteenth Amendment from exercising jurisdiction over class members and their claims where (1) the class members are non-residents who have had no contacts with the forum state (2) the class members have not affirmatively consented to its jurisdiction and (3) the claims, in which the forum state has no significant interest, arose entirely in other states.

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No.

In the Supreme Court of the United States

October Term, 1982

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

KEATON G. DUCKWORTH, District Judge, 26th Judicial District, IRL SHUTTS, and ROBERT ANDERSON and BETTY ANDERSON, individually, and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770, and 770A,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Petitioner Phillips Petroleum Company[1] prays that a writ of certiorari issue to review an order and judgment of the Supreme Court of Kansas entered in these proceedings on June 28, 1982.

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1. Petitioner's statement pursuant to Supreme Court Rule 28.1 is set forth in the Appendix hereto at page A59.

OPINIONS BELOW

The unpublished order of the Supreme Court of Kansas is set forth at page A1 of the Appendix hereto. The unpublished order of the District Court of Seward County, Kansas is set forth at page A2 of the Appendix hereto.

JURISDICTION

The order of the Supreme Court of Kansas was entered on June 28, 1982, and this Petition for a Writ of Certiorari was filed within 90 days of that date. No petition for rehearing was filed below. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The statutory provision involved is Kansas Statutes Annotated, Section 60-223 which is set forth at page A54 of the Appendix hereto.

STATEMENT OF THE CASE

Petitioner Phillips Petroleum Company (Phillips), a Delaware corporation with its principal place of business in Oklahoma, was engaged in the production and purchase of natural gas under oil and gas leases covering lands located in twelve (12) states throughout the nation rang-

ing from Texas to Wyoming and from West Virginia to Utah. See App. A42-A44. Phillips also sold the gas to various pipeline companies for transportation and resale in interstate commerce and thus the sale price was federally regulated by the Federal Power Commission (FPC).

Under FPC regulation Phillips as a natural gas company was required to obtain FPC approval of price increases for gas sales but, pending final approval of such increases, was permitted to collect the higher prices subject to refund to the purchasing pipeline companies if all or any part of the price increases were not approved by the FPC. After final approval of a gas price increase Phillips would pay to royalty owners additional royalties computed by reference to the increased price pursuant to the various contractual relationships with the royalty owners.

During the period December 30, 1975, through July 1, 1980, Phillips paid out additional royalties to the class plaintiffs by virtue of FPC Opinions 699, 749, and 770 which approved certain price increases sought by Phillips. Payment of the additional royalties had been suspended pending final resolution of the court challenges to the three FPC opinions. In this suit three named royalty owners seek to recover on behalf of all royalty owners interest on the additional royalties paid by Phillips which interest is alleged to have accrued between the time that the higher prices were collected by Phillips and the time at which the additional royalties were paid by Phillips. One of these named class representatives, Irl Shutts, is a resident of Kansas, the other two are residents of Oklahoma.

Phillips moved to dismiss the claims of non-resident plaintiff class members on the ground that the state trial court could not constitutionally exercise jurisdiction over

these claims. (See Phillips' Answer, Pre-Trial Motion and Counterclaim, App. A45). The trial court, on May 21, 1982, overruled the Motion To Dismiss and certified a nationwide class of over 34,000 plaintiffs. (App. A2).

Phillips then sought relief by way of an original mandamus action in the Supreme Court of Kansas. On June 15, 1982, Phillips filed its Petition for Order of Mandamus (App. A10) accompanied by its Memorandum in support thereof. (App. A15). Again Phillips argued that the trial court's certification of a nationwide class, which included claims of non-residents who had no connection whatever to the State of Kansas, violated the Due Process Clause of the Fourteenth Amendment and ignored fundamental principles of federalism. On June 28, 1982, the Supreme Court of Kansas denied, without opinion, the Petition for Order of Mandamus. (App. A1).

The class certified consists of royalty and overriding royalty interest owners residing in all 50 states and in several foreign countries. (App. A43-A44). Less than 2.7% of the class members are residents of Kansas. Less than one-quarter of one percent of the leases which generated the additional royalties are located in Kansas. (App. A42). Texas has a great interest in this litigation since both a majority of the properties generating the additional royalties, and a majority of the owners receiving next largest percentage of both royalty owners and lease interests. Of the $11.3 million paid in additional royalties under these three opinions, Texas residents received approximately $4.7 million. Oklahoma residents received $1.3 million. Kansas residents received approximately $123,000. The Kansas interest obviously is insubstantial when compared to that of these two states. (App. A43-A44).

The sole issue in this proceeding is whether the trial court's action, approved by the Kansas Supreme Court,

is an unconstitutional exercise of jurisdiction, violating the Due Process Clause of the Fourteenth Amendment and fundamental principles of federalism.

REASONS FOR GRANTING THE WRIT

1. The Reasons Stated By The Gillette Company In Support Of Its Petition For A Writ Of Certiorari Support Granting A Writ In This Case.

The United States Supreme Court, on April 5, 1982, granted certiorari in the *Gillette Company v. Miner*, ... U.S. ....., 102 S.Ct. 1767 (1982). That case also involves the question of the propriety of a state court's exercise of jurisdiction over a nationwide class. The reasons for granting a writ stated by the petitioners in *Gillette* are applicable with equal or greater force to the present case.

As noted by the petitioners in *Gillette*, the answer to the question of whether a state court has jurisdiction to make binding on unnamed non-resident plaintiffs a judgment rendered in a plaintiff class action is a matter of conflict between the states. The Kansas Supreme Court in *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978)[2] held no constitutional rights were invaded if procedural due process was accorded to unnamed class members,

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2. *Shutts* was an earlier lawsuit involving this defendant and one of the present plaintiffs. Involved in that action were additional royalties paid following an earlier FPC rate opinion applicable to the Hugoton-Anadarko rate area. In that action the plaintiff was allowed to act as class representative for all royalty owners who received additional royalties under the earlier opinion. The Kansas Supreme Court held that Kansas had a legitimate interest in that litigation because Kansas comprised the largest physical portion of the Hugoton-Anadarko rate making area. 222 Kan. at 557, 567 P.2d at 1314-15. Since the FPC orders involved in the present case are nationwide orders, not even this affiliating circumstance is present.

no matter how attenuated the nexus between the forum and the absent parties.[3] This holding is in substantial accord with later decisions in *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W.2d 879 (1978), and *Miner v. Gillette Co.*, 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. granted*, ... U.S. ....., 102 S.Ct. 1767 (1982).

The decision below conflicts with *Klemow v. Time, Inc.*, 466 Pa. 189, 352 A.2d 12, *cert. denied*, 429 U.S. 828 (1976), and *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976).

The conflict between the state decisions creates the situation in which a decision rendered for Phillips in Kansas would appear to be unenforceable in Pennsylvania and New Jersey. The unsettled law renders unclear whether a judgment in the Kansas action would be accepted as binding by the Texas or Oklahoma courts.[4] Both of these states have by far a greater interest in the litigation than does Kansas. The conflicting approaches to the due process requirements adopted by the different state courts raises the specter of forum shopping by non-resident plaintiffs.[5] The unfairness created by this uncertainty is even more manifest in the present case. A judgment rendered against Phillips would undoubtedly be enforced by the Kansas Courts and by the named plaintiffs on behalf of all the unnamed class members. Whether

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3. The Kansas class action statute, Kan. Stat. Ann. Sec. 60-223(b)(3) uses the opt-out type of system.

4. Oklahoma has an opt-in scheme for joining class plaintiffs. Okla. Stat. Ann. tit. 12, Sec. 14. In view of Oklahoma's legislative position, it is questionable whether Oklahoma will accept the constitutionality of the Kansas class action type of system.

5. Betty and Robert Anderson, residents of Oklahoma, originally brought a virtually identical class action suit in an Oklahoma State District Court but dismissed that suit to join with Irl Shutts as plaintiffs in the Kansas action.

a judgment in Phillips' favor would bind unnamed class members, however, would be subject to litigation in any foreign forum in any later action brought by a dissatisfied class member.

Moreover, the exercise of jurisdiction over unnamed non-resident plaintiffs is not in accord with recent decisions by this Court. In *Rush v. Savchuk*, 444 U.S. 320, 327 (1980), the Court again stated that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny . . ." *quoting Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).[6] This requirement is "a consequence of territorial limitations on the powers of the respective states," which is "imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92, 294 (1980). The Kansas Supreme Court is placed in a position of deciding unresolved issues of foreign law, or applying law contrary to the forum's own law, in this case in which it has little interest. The due process clause, acting as an instrument of federalism and acting to insure "orderly administration of the laws," should prevent that result. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).[7]

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6. The drafters of the Uniform Class Action Act have recognized that the due process requirements are applicable to unnamed plaintiff class members as well as defendants. See Section 6, Uniform Class Action Act, App. A57.

7. In prior similar actions, Kansas has purported to apply the law of the state in which the lease is located. Of the 12 states involved in this dispute, however, only two states, Kansas and Texas have direct rulings on the issue of entitlement to interest. Even those states disagree about the basis for allowance of interests, possible defenses, and the rate of interest to which the claimants might be entitled. *Compare Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978) (contract provides basis) *with Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977) ("equitable principles" pro-

(Continued on following page)

The approach of the Kansas Court in holding that no minimum contacts are required, see *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 542, 567 P.2d 1292, 1305 (1977), is directly contrary to the position adopted by the United States Supreme Court. The Kansas Court's holding ignores the balance between the courts of coequal sovereign states inherent in the constitution and recognized by this Court. In the present case Kansas has no legitimate interest in resolving the underlying litigation on a nationwide scale. Less than 2.7% of the individuals affected are residents of Kansas, and they receive less than 1.9% of the additional royalties paid by Phillips pursuant to these three opinions. (App. A43-A44).

There clearly are other jurisdictions substantially more interested in the outcome of the litigation than Kansas. Texas is the situs of the majority of properties involved and the residence of the majority of the individuals involved. Oklahoma is second in the number of leases and resident royalty owners. Oklahoma also is the residence of two of the named plaintiffs and the principal place of business of the defendant. Clearly, either of these available forums would possess a greater interest in the resolution of the current dispute. Certifying a class, without requiring a nexus between the litigation and the forum undermines the ability of these other states to regulate transactions within their borders and usurps the authority of these other, more interested jurisdictions.

Footnote continued—

vide basis) *compare Exxon Corp. v. Middleton*, 613 S.W.2d 240 (Tex. 1981) (division order controls) *with Maddox v. Gulf Oil Corporation*, 222 Kan. 733, 567 P.2d 1326 (1977) (division order ineffective), and *compare Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978) (statutory rate of interest applies) *with Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977) (court need not use statutory rate). The other interested states have not definitively ruled on the existence or exact parameters of the cause of action asserted on behalf of the unnamed plaintiffs.

Jurisdiction over the non-resident plaintiffs cannot be based on their receiving notice of class action and failing to opt out of the action. Pursuant to Kan. Stat. Ann. Sec. 60-223(b)(3) to avoid the effect of a judgment in a class action, the plaintiff must affirmatively seek to avoid the jurisdiction of the Court. A state which does not have power to compel a non-resident to submit to its jurisdiction cannot logically have power to compel that non-resident to take affirmative action to avoid its jurisdiction.[8] It is recognized that while the actions of an individual may result in a Court assuming jurisdiction, "a court cannot conclude all persons interested by its mere assertion of its own power . . . ." *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29 (1917).[9] Indeed the Court has repeatedly held that the acts of one seeking to bring another within a court's power are not constitutionally sufficient. The "unilateral activity of those who claim some relationship with a non-resident" cannot satisfy the requirements of due process. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *World-Wide Volkswagen v. Woodson*, 444 U.S. at 298.

If jurisdiction over non-residents can be invoked by the satisfaction of the procedural due process minimum of appropriate notice, without more, courts of any one state at any time could extend their reach into the lives of citizens of any other state.

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8. The Kansas opt-out method which gives rise to these constructional deficiencies, should be contrasted to the opt-in method utilized in the Oklahoma statutes. Okla. Stat. Ann. tit. 12, Sec. 14. Under this system the non-resident plaintiff must unmistakably manifest an assent to the exercise of jurisdiction by the forum.

9. See, *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, ... U.S. ....., 50 U.S.L.W. 4553 (June 1, 1982), in which a defendant raised the defense of lack of personal jurisdiction and then refused to allow discovery as to its merits. This should be contrasted to the present situation in which it is the Court which purports to acquire jurisdiction of the non-resident plaintiffs by "a mere assertion of its own power."

2. The Due Process Clause Prohibits Kansas From Binding This Non-Resident Defendant On Claims Of Non-Residents Which Arose Outside Of The Forum State.

Assertion of jurisdiction over a non-resident defendant is permissible only after a careful assessment of "the relationship among the defendant, the forum, and the litigation." *Rush v. Savchuk*, 444 U.S. 320, 327 (1980). In the case now at hand, with respect to the claims of the non-resident plaintiffs, no nexus exists between the forum, the defendant and the litigation. Absent some affiliating circumstance between non-resident plaintiffs, their claims and the forum, the due process clause should prevent a binding judgment from being entered against Phillips.

To bind Phillips on the claims of non-resident plaintiffs, jurisdiction over Phillips need be evaluated on the basis of *International Shoe* and its progeny. With respect to these claims, the minimum contacts between Phillips, this forum, and the litigation are not present. Since the non-resident plaintiffs have not chosen Kansas as the forum, the mere presence of the litigation in this particular forum does not provide a necessary connection. Kansas has no particular interest in resolving these claims of non-residents. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). No evidence or witnesses related to the non-residents' claims are located in Kansas. *Id.* 355 U.S. at 223-24. Kansas has no interest in regulating the conduct of this non-resident defendant vis a vis its out of state dealings with non-residents. *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950). The cause of action did not arise as the result of actions of the defendant in this forum. *Hanson v. Denckla*, 357 U.S. 235, 251-53 (1958).

Allowing the non-residents' claims to be litigated here in Kansas denies Phillips any "degree of predictability" which would allow Phillips "to structure their primary conduct with some assurance as to where that conduct will or will not render them liable to suit." *World-Wide Volkswagen v. Woodson*, 444 U.S. at 297. Phillips could not have reasonably anticipated being haled into the Kansas courts to defend claims of non-residents arising from leases located in other states.

3. The Court Should Grant Review To Address The "Common Fund" Issue Raised In This Case And Not In Gillette.

The Kansas Supreme Court in *Shutts v. Phillips Petroleum Co.* held that the case was "closely analogous" to the "common fund" cases of *Carpenter v. Pacific Mutual Life Insurance Co.*, 10 Cal. 2d 307, 74 P.2d 761 (1937), *aff'd sub nom., Neblett v. Carpenter*, 305 U.S. 297, *reh'g denied*, 305 U.S. 675 (1939); *Sovereign Camp of Woodmen of the World v. Bolin*, 305 U.S. 66 (1938); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915), and *Supreme Council Royal Arcanum v. Green*, 237 U.S. 531 (1915). 222 Kan. at 552, 567 P.2d at 1311.[10] Presumably, this reasoning utilized by the Kansas Supreme Court in the prior case involving interest on additional royalties was utilized by the Kansas Supreme Court in this case in deciding not to require decertification of the non-resident class.

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10. Compare this statement to the statement of the Kansas Supreme Court in which the Court correctly indicated that these claims could not be aggregated for federal jurisdictional purposes. 222 Kan. at 545, 567 P.2d at 1306.

The Kansas Supreme Court's extension of these cases to encompass the present factual situation is perplexing. In the prior similar class action cases, the Court clearly held that no discrete "fund" existed. The right of class members to recover on a claim for interest depended on whether the law of the various states recognized a right to the interest. Phillips recognizes that the claims of the plaintiffs may present some common questions within the meaning of the class action statutes. The fact that the claims of the class members are products of various states' laws, however, prevents the claims of the class members from being "common" in the sense utilized in the earlier "common fund" cases. Were there actually claims to a "common fund," aggregation of the claims may be permissible for federal court jurisdictional purposes. *See Snyder v. Harris*, 394 U.S. 332, 335 (1969). Notwithstanding the fact that there was no commonly created right to this nonexistent fund, the Kansas Supreme Court utilized the "common fund" cases to support their holding.

In utilizing these precedents, not only has the Kansas Supreme Court attempted to force this case into a mold into which it simply will not fit, but the Kansas Supreme Court has also failed to recognize that in the various common fund cases the strength of the affiliating circumstances between the defendant, the forum, and the litigation were the decisive factor. In those common fund cases, the binding judgment was decided in the state of incorporation of the defendant. Those causes of action arose and were determined by the laws of the forum state, and in the state which had the most significant interest in the dispute. Indeed, this Court in *Hartford Life Ins. Co. v. Ibs* explicitly held that a class action of this nature "should be brought in a court of the state where the company was chartered and where the monetary fund was kept." 237

U.S. at 672.[11] The Kansas Supreme Court's approach, however, requires only that one party having a claim in common without others be a resident of the forum state. Out of this commonality of separate claims a purely fictional common fund is held to exist.

The Kansas Supreme Court's approach, logically extended, could result in all cases falling within the "common fund" rule. Any judgment rendered against a defendant in favor of a class could constitute a "common fund." If similar claims, arising under any number of states' laws, could be aggregated to create a fictional fund, then the narrow jurisdictional exception created by these cases swallows the general rule.

The Court should hear this case so as to consider whether this "quasi-common fund" notion formulated by the Kansas Supreme Court passes constitutional muster.

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11. In this case, if the individual claims can be aggregated to create a quasi-common fund, the situs of that fund must be in Oklahoma, where the decisions which controlled the use of the reserves were made. See 222 Kan. at 560, 567 P.2d at 1316.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 82-54608-S

Phillips Petroleum Company, Appellee,

v.

Honorable Keaton Duckworth, District Judge,
26th Judicial District, et al., Appellants.

You are hereby notified of the following action taken in the above entitled case:

PETITION FOR ORDER OF MANDAMUS.

DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date June 28, 1982

A2

(Filed June 3, 1982)

IN THE
DISTRICT COURT OF SEWARD COUNTY, KANSAS
CASE NO. 79-C-113

IRL SHUTTS and ROBERT ANDERSON and
BETTY ANDERSON, Individually and as
representatives of certain others,
Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

JOURNAL ENTRY ON CLASS CERTIFICATION AND NOTICE

NOW, on this 21st day of May, 1982, this matter comes on for hearing on plaintiffs' motion to certify as a class action and determine notice, and defendant's motion to dismiss as to all members of the class not residents of Kansas. The following appearances are made:

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Thereupon, the motions are presented and argued to the Court after the matters had been briefed by counsel. The Court, having read the briefs and heard argument of counsel, and based upon the files and records in this matter and the evidence presented, finds, AND IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The proposed class of parties plaintiff is extremely numerous and exceeds some 33,000 members and an actual joinder of all members is totally impracticable.

2. The claims of plaintiffs are typical of the claims of all the members of the class except that each owner may be entitled to a different amount of interest and the interest to each owner, if allowed, would be too small to enable each to file a separate action.

3. The only questions of law and fact in this case are common to the entire proposed class, in that the sole issue appears to be whether defendant is liable for interest on the money received by it from purchasers of gas pursuant to opinions No. 699, 749 and 770 of the Federal Power Commission and withheld by defendant for a period from December 30, 1975, to July 1, 1980.

4. This action should be certified as a class action and the plaintiff class is defined as follows:

> "All royalty owners and overriding royalty owners to whom Phillips Petroleum Company made suspense royalty payments between December 30, 1975, and

July 1, 1980, relating to Federal Powers Commission Opinions 699, 749 and 770 (which includes 699H, 749C and 770A)."

5. Notice of the pendency of this action, its nature and effects of any judgment shall be given to all members of the class. The form of such notice, which is approved by the Court, is attached hereto and made a part hereof. The defendant shall provide to the plaintiffs a list of all members of the class and their mailing addresses as shown by defendant's records. The defendant shall provide to plaintiffs pressure sensitive mailing labels for each member of the class which shall contain thereon their individual name and address. The plaintiffs shall cause the notice to be mailed to all members of the class by first class mail and the plaintiffs shall bear all expense thereof. The envelopes shall contain the following return information:

RETURN TO:

SMITH, GREENLEAF & BROOKS
Box 1039
Liberal Kansas 67901.

The notice is to be dated June 15, 1982, and request for exclusion must be filed by August 1, 1982.

6. If any of the notices sent to class members are returned by the postal service as non-deliverable, the plaintiffs will notify defendant of the names; and defendant is to further check its records and provide plaintiffs with all information it has pertaining to such class member, so that notice may be provided to such person and/or such persons, heirs, devisees or assigns.

7. The plaintiffs' request to certify as a class other than the class set out herein is overruled.

8. The defendant's motion to dismiss as to non-resident class members is overruled.

/s/ Keaton G. Duckworth
Judge

APPROVED AS TO FORM:

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By /s/ T. L. Cubbage
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IN THE
DISTRICT COURT OF SEWARD COUNTY, KANSAS

CASE NO. 79-C-113

IRL SHUTTS and ROBERT ANDERSON and
BETTY ANDERSON, Individually and as
representatives of certain others,
Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

NOTICE OF CLASS ACTION SUIT

TO: Royalty owners and overriding royalty owners to whom Phillips Petroleum Company made suspense royalty payments between December 30, 1975, and July 1, 1980, relating to Federal Power Commission Opinions No. 699, 749, and 770.

This notice is to inform you that you, as royalty owner or overriding royalty owner under an oil and gas lease in which Phillips Petroleum Company is an interest owner, are a member of the plaintiff class, in a court action against Phillips Petroleum Company.

The purpose of this Notice is to advise you of your rights and obligations in relation to this lawsuit.

This suit was filed in July, 1979, by the above named plaintiffs, individually and on behalf of all other royalty owners and overriding royalty owners to whom this notice is directed. Plaintiffs seek judgment against Defendant for the payment of interest on suspended royalty paid by Defendant between December 30, 1975, and July 1, 1980, attributable to increased gas sales prices approved

by the Federal Power Commission in Opinions Nos. 699, 749, and 770. There are in excess of 30,000 gas royalty owners and overriding royalty owners who are members of the class.

Defendant Phillips had denied any liability to plaintiffs or members of the class described above.

The Court has made no rulings as to the merits of these claims or defenses, yet has held that this action is to be maintained as a class action. Accordingly:

1. By order of this court dated May 21, 1982, you have been found to be a member of the plaintiff class in this lawsuit.

2. As a class member, your interests are currently being represented by the three named plaintiffs and their attorneys of record listed below. Any class member, if he or she so desires, may appear in the case in person or through his or her own counsel.

3. You may elect to be excluded from the class, by sending the request for exclusion form which appears at the end of this notice to the Clerk of the Court addressed as follows:

Clerk of the Court
Seward County, Kansas
415 N. Washington
Liberal, Kansas 67901

This request must be mailed so as to be received on or before August 1, 1982. The Court has determined that all requests for exclusion received on or before that date will be granted without further hearing.

4. Judgment in this action, whether for the plaintiff class or the defendant, will be binding upon all class mem-

bers except those who may be excluded as above stated. Class members excluded will not be entitled to share in the benefit of any judgment or settlement entered or concluded favorable to the plaintiff class, nor will excluded class members be held bound in this action if judgment is rendered for Phillips.

5. Plaintiffs' attorneys fees are contingent on recovery. If the plaintiffs are successful, the court will allow a reasonable attorneys' fee for plaintiffs' attorneys, not exceeding one-third of the interest fund created. This means that if a judgment in your favor is entered, the court may award up to one-third of it to be paid to the plaintiffs' attorneys to compensate them for representing your interests. If you elect to intervene with your own attorneys, your share of the favorable judgment will not be reduced. If you request exclusion from the class, you will not be assessed any attorneys' fees. If plaintiffs are unsuccessful, there will be no allowance of attorneys' fees.

If you want further information, please do not call or write the Judge or the Clerk of the Court, but call or write one of the attorneys listed below.

DATED: June 15, 1982.

Keaton G. Duckworth, District Judge

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(Filed June 15, 1982)

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 82-54608-S

PHILLIPS PETROLEUM COMPANY,
Plaintiff,

vs.

KEATON G. DUCKWORTH, District Judge, 26th Judicial District, IRL SHUTTS, and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770, and 770A,
Respondents.

PETITION FOR ORDER OF MANDAMUS

COMES NOW Phillips Petroleum Company (Phillips) and for its claim for relief alleges:

1. Phillips is a corporation organized and existing under and by virtue of the laws of the State of Delaware, having as its principal place of business Bartlesville, Oklahoma.

2. The Honorable Keaton G. Duckworth is the duly elected, qualified and acting District Judge of the Twenty-sixth Judicial District of the State of Kansas. Irl Shutts, Robert Anderson and Betty Anderson in their individual and representative capacities are plaintiffs in a pending lawsuit as hereinafter described.

3. This Court has jurisdiction to hear original actions in mandamus by virtue of Article III, Section 3, of the

Constitution of the State of Kansas, K.S.A. 20-101, and Supreme Court Rule 9.01. Mandamus is an appropriate method by which to test the jurisdiction of an inferior court. This Court should hear this action rather than the District Court, since mandamus is an appropriate vehicle to control the activities of a District Court when it exceeds its lawful jurisdiction.

4. On July 3, 1979, Irl Shutts, Robert Anderson and Betty Anderson filed an action against Phillips Petroleum Company in the District Court of Seward County, Kansas, Case No. 79-C-113. A certified copy of the Petition is attached hereto, marked Exhibit "A", and incorporated herein. The plaintiffs purported to bring that action on behalf of themselves and various nation-wide classes of royalty owners and producers under oil and gas leases for payment of interest on additional FPC royalties which Phillips had paid pursuant to FPC Opinions Nos. 699, 699H, 749, 749C, 770, and 770A.

5. On August 7, 1979, Phillips filed its Answer, Pretrial Motion and Counterclaim generally denying the allegations of the petition, asserting that the District Court was without jurisdiction of the alleged nation-wide class and Phillips moved to dismiss the action as to the unnamed non-resident class members. A certified copy of said Answer, Pretrial Motion and Counterclaim is attached hereto, marked Exhibit "B," and incorporated herein.

6. On August 15, 1980, the plaintiffs filed a Motion To Certify as a Class Action. A certified copy of said Motion is attached hereto, marked Exhibit "C," and incorporated herein. By such motion plaintiffs sought to certify a nation-wide class of plaintiffs consisting of three nation-wide subclasses of royalty owners and producers as follows:

a. A subclass consisting of producers and royalty owners who received payment from Phillips of sus-

pended monies pursuant to FPC Opinions 699 and 699H, 23,858 checks having gone out to them.

b. A subclass consisting of producers and royalty owners who received payments from Phillips pursuant to Opinions Nos. 749 and 749C theretofore suspended by Phillips, total number of checks going out to producers and royalty owners being approximately 23,500 checks.

c. A subclass consisting of producers and royalty owners who received payment from Phillips pursuant to FPC Opinions Nos. 770 and 770A theretofore suspended by Phillips, there having been more than 16,157 checks gone out to such producers and royalty owners.

7. On May 21, 1982, an Order was entered purporting to establish a nation-wide class of plaintiff royalty owners and overruling Phillips' motion to dismiss the claims of the non-resident putative class members. A certified copy of said Order is attached hereto, marked Exhibit "D," and incorporated herein. At the same time, Judge Duckworth set this matter for trial on September 9, 1982, in Liberal, Kansas.

8. Phillips alleges that Judge Duckworth was without authority to enter the Order, Exhibit "D," because the court lacked jurisdiction over the claims of unnamed non-resident putative class members. A memorandum of authorities on this point is being filed concurrently herewith.

9. Phillips alleges further that the defendant failed to follow this Court's implicit holding in *Shutts v. Phillips Petroleum Company*, 222 Kan. 527, 567 P.2d 1291 (1977) *cert. denied*, 434 U.S. 1068 (1978). In that case this Court approved the rule of *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (1976), and cited that case as an

"excellent example of a factual situation" in which state court jurisdiction over a nation-wide class should be denied. Phillips alleges that the present action pending before the Honorable Keaton G. Duckworth is in all respects the same as *Feldman v. Bates* approved by this Court as is further demonstrated by the memorandum of authorities filed herewith.

10. Phillips is entitled to an order of mandamus from this Court directing the Respondent, the Honorable Keaton G. Duckworth, to modify the Class Order of May 21, 1982, by decertifying the class as to all unnamed non-residents of the State of Kansas and by dismissing all claims of such unnamed non-resident putative class members. In the meantime, and pending a hearing on this Petition, Phillips requests an order of this Court staying all further proceedings in Case No. 79-C-113 before the Respondent Keaton G. Duckworth until the jurisdiction of that court to proceed is finally adjudicated. In that regard, Phillips has been advised by counsel for Shutts, et al., that, because of the filing of this Petition, Shutts, et al., do not intend to mail the class notices as provided for in the Class Order of May 21, 1982, until this matter is finally determined. As noted above, this case is presently set for trial on September 9, 1982, as a nation-wide class action. If it is ultimately determined, as Phillips believes that it will be, that the court lacks jurisdiction over the claims of the unnamed non-resident class members, then Phillips will be extremely prejudiced by being put to a trial of this case as a nation-wide class action suit over which the court lacks jurisdiction.

11. This Court should issue the admittedly extraordinary order of mandamus to supervise the lower court and render a final decision on the important jurisdictional question raised by this Petition. No other procedure is available to Phillips to seek redress from what it considers to be an unconstitutional exercise of jurisdiction. There-

fore, Phillips, in order to protect its rights, requests that this Court enter an order of mandamus to the Respondent, the Honorable Keaton G. Duckworth, as hereinbefore described.

WHEREFORE, plaintiff Phillips Petroleum Company prays that this Court issue an order of mandamus directed to the Honorable Keaton G. Duckworth, District Judge of the 26th Judicial District of the State of Kansas, ordering and directing said Respondent to modify the Order entered on May 21, 1982, by decertifying the class as therein defined as to all unnamed non-resident class members and further modify said order by dismissing the purported claims of all said unnamed non-resident class members against Phillips. Phillips further prays for an order staying all further proceedings in Case No. 79-C-113 before the Respondent Keaton G. Duckworth until this matter has been finally determined, and for such other and further relief as to the Court may seem just and equitable.

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(Filed June 15, 1982)

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 82-54608-S

PHILLIPS PETROLEUM COMPANY,
Plaintiff,

vs.

KEATON G. DUCKWORTH, District Judge, 26th Judicial District, IRL SHUTTS, and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770, and 770A,
Respondents.

MEMORANDUM IN SUPPORT OF PETITION FOR ORDER OF MANDAMUS

INTRODUCTION

The nature of the dispute underlying *Shutts v. Phillips Petroleum Company*, Case No. 79-C-113 (*Shutts II*), should be familiar to the Court. This action is one brought to obtain interest on additional royalties paid by Phillips Petroleum Company (Phillips) to gas royalty owners following approval of gas rate increases by the Federal Power Commission. In many respects, this action is similar to the prior action of *Shutts v. Phillips Petroleum Company*, 222 Kan. 527, 567 P.2d 1291 (1977) *cert. denied*, 434 U.S. 1068 (1978) (*Shutts I*). In important factual respects, however, this present action differs greatly from the prior action.

On May 21, 1982, the Honorable Keaton G. Duckworth certified a class which included individuals residing throughout the nation and several foreign countries. This action was taken although the uncontroverted record disclosed that only a minute fraction of the unnamed individuals owned interests in Kansas gas properties or were Kansas residents. The remaining individuals—well over 95 percent of the royalty owners involved—have interests which arose outside the state and are totally unconnected with Kansas. As to those claims, Phillips maintains that Kansas lacks the *necessary legitimate interest* required to exercise jurisdiction over these claims. Phillips opposed class certification on this basis and was unsuccessful. Because Phillips believes that the actions of the lower court in certifying a nation-wide class clearly exceed the jurisdictional limits of the lower court and are contrary to both Kansas law and the United States Constitution, Phillips is seeking relief by way of mandamus.

This memorandum is submitted pursuant to Supreme Court Rule 9.01(b). The issues addressed in this memorandum are:

(1) Is mandamus an appropriate remedy?

(2) Do the actions of the District Court violate Kansas law?

(3) Do the actions of the District Court violate Constitutional guarantees?

(4) Does the holding of *Shutts I* remain viable in light of subsequent pronouncements?

The issues before this Court are currently also before the United States Supreme Court. The United States Supreme Court has granted certiorari to consider the case of *The Gillette Company v. Miner*, 87 Ill.2d 7, 428 N.E.

2d 478 (1981) *cert. granted* 50 U.S. Law Week 3796 (1982). A copy of the Petition for Certiorari is attached to this memorandum as Exhibit "A." It is clear that the United States Supreme Court decision in *Gillette* will control the disposition of the constitutional arguments raised in this mandamus proceeding. Phillips respectfully requests this Court stay action in the lower court until after the United States Supreme Court has acted on what is the controlling issue of law.

I. MANDAMUS IS AN APPROPRIATE MEANS TO DEFINE JURISDICTION

Kansas law justifies the use of extraordinary writs to restrain the actions of a public official when that official attempts to act beyond his legal authority. *Bushman Construction Co. v. Schumacher*, 187 Kan. 359, 356 P.2d 869 (1960). Indeed, extraordinary writs have been used to test the propriety of a court's assertion of jurisdiction over non-residents. *Vilm v. Hudson*, 167 Kan. 372, 205 P.2d 1021 (1949).

In *Muck v. Claflin*, 197 Kan. 594, 596, 419 P.2d 1017 (1966), this Court held: "Where a litigant has a right or privilege as a matter of law and there is no other remedy, this Court will entertain a mandamus action to protect it." In *Muck*, mandamus was entertained in a dispute involving discovery seeking insurance policy limits. In *Cloonan v. Goodrich*, 161 Kan. 280, 167 P.2d 303 (1946), and *State Highway Commission v. Hembrow*, 190 Kan. 742, 378 P.2d 62 (1963), mandamus was allowed to require that the trial of those actions be to a jury.

The necessity of granting the extraordinary relief sought in this action is as compelling to Phillips in this case as it was in *Muck*, *Cloonan*, or *Hembrow*. Phillips

now faces the specter of trying a case involving approximately 34,000 parties. A trial and appeal of this case could thus be prolonged, and will necessarily be complicated because of significant factual differences between this case and *Shutts I*. Phillips asserts that the court is without jurisdiction over the claims of over 97 percent of these individuals. The importance of obtaining review of the District Court's order at this time and the harm which would befall Phillips if review is denied are clear. Phillips thus asserts that this case is properly before the Court.

II. CERTIFICATION OF A NATIONWIDE CLASS WAS CONTRARY TO THE KANSAS SUPREME COURT'S HOLDINGS

The Kansas Supreme Court has recognized the necessity of affiliating circumstances (i.e., a necessary legitimate interest) between plaintiff class litigation and the forum. In *Shutts I*, the Kansas Supreme Court held that *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (1976) was an "excellent example of a factual situation" in which class action status should be denied. In *Feldman*, a single plaintiff sought to represent 294 unnamed plaintiffs in an action against a foreign corporation. The corporation had no assets in New Jersey and was not authorized to do business in that state. Thirty-one unnamed plaintiffs, well over 10 percent, were residents of the forum. The cause of action on behalf of the class arose out of a common course of conduct.

The holding of *Feldman* was inapplicable to the factual situation present in *Shutts I*, since in *Shutts I* the necessary affiliating circumstances were held to be present. The Court in *Shutts I*, found that the fact that Kansas comprised the largest physical portion of the area affected

by Federal Power Commission Order No. 586 was a sufficient affiliating circumstance such that jurisdiction over the non-resident plaintiffs was appropriate. See, 222 Kan. at 537, 539, 550. Kansas had "a legitimate interest in adjudicating the common issue herein *because Kansas comprise[d] the largest physical area included in the FPC designated Hugoton-Anadarko area . . . .*" 222 Kan. at 557 (emphasis added).

The present factual situation discloses a completely different picture. A detailed analysis of the correlation between the various class members and various forums can be found in Affidavit No. 4 (originally filed as an attachment to Defendants' Brief on Jurisdiction Over Claims of Non-Residents and attached hereto as Exhibit "B"). The Affidavit shows that of the three rate increases involved in *Shutts II*, Opinion No. 749 had the greatest impact on Kansas. Even in this case, however, the interest of Kansas is minute. Of the 20,566 royalty owners across this nation, only 553 are residents of Kansas, less than 2.7%. Of the 6,109 leases across this nation, only 15 are located in Kansas, less than one quarter of one percent (.25%). These figures clearly show the relative insignificance of the interest of Kansas when compared to that of other states:

State	No. of Royalty Owners	No. of Leases
Texas	7,881	3,479
Oklahoma	3,591	1,948
New Mexico	339	350
Louisiana	740	178
Wyoming	37	68
West Virginia	246	32
Arkansas	171	32
Kansas	553	15
Mississippi	88	3
Utah	18	1
Illinois	357	1

The interest of Kansas in this litigation does not even have the affiliating circumstances found to be so significant in *Shutts I*. In this nationwide order, Alaska would seem to comprise the largest physical area of the area affected. Of the states in which Phillips owns oil interests, the areas are:

State	Area (sq. mi.)
Texas	267,339
New Mexico	121,666
Wyoming	97,914
Utah	84,916
Kansas	82,264
Oklahoma	69,919
Illinois	56,400
Arkansas	53,104
Louisiana	48,528
Mississippi	47,716
West Virginia	24,181

Under these circumstances, it is clear that Kansas courts have no "legitimate interest" in resolving the claims now asserted by non-residents of Kansas. What is the impact on Kansas of a dispute arising from the sale of gas in Illinois between, say, a New York resident and Phillips, a Delaware corporation with its principal place of business in Oklahoma? As held by the Kansas Supreme Court in *Shutts I*, 222 Kan. at 557, careful attention must be given to possible difference of laws, so this Kansas Court would be placed in the position of ruling on a possibly unresolved issue of foreign law in a dispute involving non-residents, neither of which actively chose this forum as the place in which to litigate their dispute.

It would appear that the facts now before this Court present a substantially less compelling basis for certifying a class than was present in *Feldman v. Bates Mfg. Co.* In *Feldman* over 10 percent of the class members were residents of New Jersey, the forum state. In *Shutts II*, less than 2.5 percent of the possible class members are residents of Kansas. The possible recovery of Kansas residents or non-residents who have an interest in Kansas leases would only be six to nine percent interest on $122,-638.40, the amount paid to these people. This $122,638.40 represents less than 1.9 percent of the amount paid by Phillips pursuant to the three FPC opinions. The amount of money attributable to Kansas leases under all three of those opinions is less than .00254 percent of the total amount paid. While Kansas Courts may have a legitimate interest in ensuring that the people affiliated with Kansas have their claims heard, this proportionally negligible amount cannot serve as a legitimate basis on which to predicate a nationwide class.

The plaintiffs in *Shutts II* claim that the forum need not have a legitimate interest. The plaintiffs would require

only that there be jurisdiction over the defendant and procedural due process accorded absent class members. This argument, which ignores the requirement of a "legitimate interest" leads to absurd results. Pursuant to this concept, this action could be tried in Rhode Island, where $2.19 was paid to class members under Opinion 749, or in Illinois where one lease was located which produced $1.30 of extra royalty. For that matter, acceptance of plaintiffs' theory would result in it being possible to bind Kansas residents by judgments entered in any state in which Phillips has a registered agent whether or not any lease or royalty owner was located there. This result clearly does not comport with the requirement of the Kansas Supreme Court that the forum have a "legitimate interest" in the litigation, or "traditional notions of fair play and substantial justice," inherent in constitutional due process limitations.

III. THE LACK OF A LEGITIMATE INTEREST MAKES CERTIFICATION OF A NATIONWIDE CLASS UNCONSTITUTIONAL

The Court's action in certifying a nationwide class impinges on the constitutional rights of both Phillips and the unnamed plaintiff class members. Both Phillips and the unnamed plaintiff class members have the constitutional right to have their dispute tried by a forum which is legitimately interested in the underlying dispute. The nature of this right can easily be discerned in the Supreme Court cases governing assertion of jurisdiction over non-residents.

The traditional concepts of jurisdiction over non-residents require an assessment of the relationship between the litigation, the forum and the defendants. Since the decision of *International Shoe Co. v. Washington*, 326

U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945), the strength of these relationships has been the determining factor in U.S. Supreme Court cases.

Of these various relationships, the nexus between the litigation and the forum has been given great weight in determining whether the exercise of jurisdiction is proper. In *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1957), the Court held that an insurance company could be held liable on an insurance contract in a California court, although the company had little contact with the forum. The deciding factor was the relationship between the forum and the litigation. Jurisdiction was proper where the forum had "a manifest interest in providing effective means of redress for its residents . . . ." The plaintiffs would suffer "a severe disadvantage if they were forced to follow the insurance company to a distant state in order to hold it legally accountable." *Id.* at 223, 2 L. Ed. 2d at 226. For these reasons, the relationship between the cause of action and the forum justified and the exercise of jurisdiction.

Those same reasons which justified exercise of jurisdiction in *McGee* required denial of jurisdiction in *Hanson v. Denckla*, 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958). *Hanson* involved the exercise of jurisdiction over a Delaware trustee by a Florida court. That action involved "an agreement that was entered without any connection with the forum State." *Id.* at 252, 2 L. Ed. 2d at 1297. "The first relationship Florida had to the agreement was years [after the agreement was executed] when the settlor became domiciled there . . . ." *Id.* Thus, the suit could not be said to be "one to enforce an obligation that arose from a privilege the defendant exercised in Florida." *Id.* The lack of affiliating circumstances be-

tween the forum and the litigation made the exercise of jurisdiction improper.

In recent years the Supreme Court has reaffirmed and emphasized the importance of the presence of some nexus between the litigation and the forum. *Shaffer v. Heitner*, 433 U.S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977) involved a *quasi in rem* action brought under a Delaware sequestration statute. The plaintiff was seeking to assert jurisdiction over the defendant by virtue of property of the defendant being found in Delaware. The cause of action arose outside of the forum state. In *Shaffer* the Supreme Court held that *"all assertions of state court jurisdiction* must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Id.* at 212, 53 L. Ed. 2d at 703 (emphasis added). Jurisdiction was asserted solely on the basis of the presence of defendant's property in the forum state. Yet, the court noted, "that property [was] not the subject matter of this litigation, nor [was] the underlying cause of action related to the property." *Id.* at 213, 58 L. Ed. 2d at 703. The plaintiff did not "identify any act related to his cause of action as having taken place in Delaware." *Id.* The lack of affiliating cricumstances between the litigation and the forum made the assertion of jurisdiction improper.

The two most recent Supreme Court pronouncements on this topic are *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980), and *Rush v. Savchuk*, 444 U.S. 320, 62 L. Ed. 2d 516, 100 S. Ct. 571 (1980). Both were decided subsequent to *Shutts I*.

World-Wide Volkswagen considered at length the concept of jurisdiction and its relationship to the 14th amendment. The concept of personal jurisdiction serves two

purposes. Not only does it protect a non-resident defendant from the burdens of litigating a case in a distant forum, but it also "acts to ensure that the States, through their courts, do not reach out beyond the limits on them by their status as coequal sovereigns in a federal system." 444 U.S. at 292, 62 L. Ed. 2d at 498. The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there." *Id. quoting, International Shoe Co. v. Washington*, 326 U.S. at 317, 90 L. Ed. 95, 66 S. Ct. 154.

The burden or lack of burden on a defending party is only one factor to consider. The Court must consider other relevant factors, including

> the forum State's interest in adjudicating the dispute, see McGee v International Life Ins. Co. 355 US 220, 223, 2 L. Ed. 2d 223, 78 S Ct 199 (1957); the plaintiff's interest in obtaining convenient and effective relief, see Kulko v California Superior Court, supra, at 92, 56 L. Ed. 2d 132, 98 S Ct 1690, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, cf. Shaffer v Heitner, 433 US 186, 211, n 37, 53 L. Ed. 2d 683, 97 S Ct 2569 (1977); the interstate juridical system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see Kulko v California Superior Court, *supra*, at 93, 98, 56 L. Ed. 2d 132, 98 S Ct 1690.

444 U.S. at 292, 62 L. Ed. 2d at 498.

The limits imposed on a state court arise from the sovereign nature of the states:

> [T]he States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States - a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

444 U.S. at 293, 62 L. Ed. 2d at 499. The due process clause acts to defend the concept of federalism even in cases where the defendant would be unharmed by the plaintiff's choice of forum:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

444 U.S. at 294, 62 L. Ed. 2d at 499-500.

Rush v. Savchuk, 444 U.S. 320, 62 L. Ed. 2d 516, 100 S. Ct. 571 (1980), decided the same day as *World-Wide Volkswagen* is much more analogous to the situation at hand. The plaintiff in *Rush* sought to assert jurisdiction over a defendant's insurance company using the jurisdictional theory set forth in *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312 (1966). This theory involved attaching the liability policy of a defendant. If the insurer can be found in a *Seider* jurisdiction, the contractual obligation to defend and indemnify up to the policy limits is thought to be a debt, subject to attachment, sufficient to support *quasi in rem* jurisdiction over the absent defendant. 444

U.S. 325-26, 62 L. Ed. 2d at 523. In this manner, the Minnesota plaintiff was able to obtain jurisdiction over a non-resident defendant in a claim for damages sustained outside of the forum state.

In striking down the assertion of jurisdiction in this case, the court again reviewed the governing principles:

> In determining whether a particular exercise of state court jurisdiction is consistent with due process, the inquiry must focus on "the relationship among the defendant, the forum, and the litigation." Shaffer v. Heitner, supra. at 204, 53 L. Ed. 2d 683, 97 S Ct 2569.

444 U.S. at 327, 62 L. Ed. 2d at 524. The mere presence of property within the jurisdiction was insufficient.

> We held in *Shaffer* that the mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction over an unrelated cause of action.

444 U.S. at 328, 62 L. Ed. 2d at 525. Indeed, the "adventitious" decision of the insurer to be present in the state did not have any jurisdictional significance.

The focus required by *Rush v. Savchuk* is on "the relationship among the defendant, the forum, and the litigation." 444 U.S. at 327, 328 n.14, 332, 62 L. Ed. 2d at 524, 525, 527.

The teachings of these most recent Supreme Court holdings, applicable to this present case are clear. A state court, as a result of the constitutional notion of federalism is territorially limited in the extent to which it can assert jurisdiction. A dispute involving a resident defendant, or which arose in the forum, or in which the forum is

otherwise interested is properly resolved by a forum court. The exercise of jurisdiction over a non-resident, however, requires some link between the non-resident and the forum. In the absence of an affiliating circumstance, the sovereign nature of the states prevents the assertion of jurisdiction over the non-resident. This notion of federalism would prevent the binding of Kansas residents by a judgment under the circumstances in *Shutts II* rendered in Illinois, or Rhode Island, in light of the lack of nexus between that forum and the litigation. Similarly, the same territorial limitation should prevent this Court from binding Oklahoma residents in their dispute which arose in Oklahoma, with a company whose principal place of business is Oklahoma. The sovereign nature of the states prevent one state from interfering in the intra-state affairs of another state. The notion of due process affords a citizen the right not to be bound by a judgment entered into in a disinterested foreign state. For these reasons, the exercise of jurisdiction over a nationwide class in this case violates the holdings of *World-Wide Volkswagen v. Woodson* and *Rush v. Savchuk*.

The requirement that the forum possess a legitimate interest created by a substantial nexus between the forum and the litigation apply equally to non-resident plaintiffs in a plaintiff class action. The necessity of such a connection can be seen in the "common fund" class action cases of *Supreme Council Royal Arcanum v. Green*, 237 U.S. 531, 35 S. Ct. 724, 59 L. Ed. 1089 (1915); *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662, 36 S. Ct. 692, 59 L. Ed. 1165 (1915), *Hartford Life Insurance Co. v. Barber*, 245 U.S. 146, 38 S. Ct. 54, 62 L. Ed. 208 (1917), and *Sovereign Corp of Woodmen of the World v. Bolin*, 305 U.S. 66, 59 S. Ct. 35, 83 L. Ed. 45 (1938). In all of these cases, there was the requisite nexus between the litigation and the forum to make a decision binding even against a non-

resident plaintiff. In all of these cases, the judgment asserted as a bar was decided in the state of incorporation of the defendant. The rights adjudicated arose and were determined by the laws of the state in which the defendant was chartered. Indeed the situs of the fund was the forum. The necessary connection among the defendant, the forum and the litigation was sufficiently strong to justify adjudicating the rights of the unnamed, non-resident plaintiffs.

No argument can be made that the "common fund" cases are directly applicable to the present case. Although the Court in *Shutts I* held that the common fund cases were "analogous," the numerous distinctions between this case and the "common fund" cases prevent those cases from being directly applicable. As noted in *Shutts I*, there was no separate fund as such. 222 Kan. at 552. The closest thing to a "fund" found in *Shutts I* was the obligation represented by the corporate undertaking filed by Phillips with the FPC to guarantee refund to pipeline companies of any portion of the rate increase disapproved by the FPC. The Court in *Shutts I* then purported to segregate a portion of this undertaking into an amount which would be claimed by royalty owners in the event of affirmation of the rate increase. The plethora of contractual relationships under which royalty owners may claim entitlement to royalties arising from a FPC gas price increase makes it impossible to sequester a portion of the corporate undertaking into an amount which would bear any relationship to the final obligation of Phillips to royalty owners flowing from the approval of a FPC price increase.

At best, the total liability of Phillips to royalty owners for royalties arising from an increase in gas prices is simply an aggregation of individual claims, determined by individual contractual arrangements and by different

states' laws. This total liability might be likened unto a fund, but the individual factors which determine individual entitlement to a recovery from Phillips prevents this "fund" from being "common."

The royalty owners claims to interest is even more difficult to shape into the context of a common fund. These claims are equitable in nature, and are creations of the various state law. These claims are subject to various defenses under various state law provisions. The amount of those claims is determined in accordance with the various state laws. There is no common interest in these claims, and indeed, without this element of a common interest in these claims, their aggregation so as to form a "common fund" would seem inappropriate. Were there a common interest aggregation would be appropriate and would make this case susceptible to federal court jurisdiction. *See, Glover v. Johns Manville,* 662 F.2d 225, 230 (4th Cir. 1981). In *Shutts I* this Court recognized the plaintiffs' inability to aggregate their individual claims in order to obtain federal court jurisdiction. *Shutts I,* 222 Kan. at 544-45.

The "common" requirement of any claims to any "fund" held by Phillips is defeated by conflicting laws of states involved in this dispute. On at least two important issues, the law of Texas and the law of Kansas conflict. Just as these conflicting legal standards can defeat the commonality requirement of the class action statute, see *Shutts I,* 222 Kan. at 557, they also act to defeat the existence of any purported "common fund."

Texas gives effect to provisions in division orders which modify royalty agreements. In *Exxon Corp. v. Middleton,* 613 S. W. 2d 240 (Tex. 1981), the Texas Supreme Court held that division orders were "binding for the time the parties acted under them." 613 S.W.2d at 250. This

holding was reaffirmed more recently in *Sun Oil Company v. Madeley*, 25 Tex. S. Ct. J. 101 (Tex. Sup. 12/16/81). These decisions are directly contrary to the Kansas decision of *Maddox v. Gulf Oil Corporation*, 222 Kan. 733, 567 P.2d 1326 (1977).

Other states which are involved in this case appear not to have ruled on this dispute. Commentators, however, take the position that the Texas approach is better. *See*, 4 Williams Oil & Gas Law, § 705: "Insofar as the division or transfer order differs from the lease as concerns the measurement of quantity, quality, price or value of the production, the lease provisions are modified by the provisions of the order as for all parties to the unrevoked order." Should a nationwide class be certified, the Court will be placed in deciding this unsettled legal issue pursuant to foreign law, and only some of the other states involved have certified question procedures.

The second conflicting area is the rate at which interest is allowed. Subsequent to *Shutts I*, the Texas Supreme Court considered a similar case in *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (1978). *Stahl* also dealt with whether interest was due on payments made following F.P.C. approval of an increased rate. In *Stahl*, Phillips had posted a corporate obligation and agreed to refund with interest any increase ultimately disapproved by the F.P.C. The Texas Supreme Court considered the contractual language which specified how royalty payments were determined, and held that the contract provided the basis for allowance of interest. *Id.* at 484. The Texas court also found that there existed an equitable basis for allowing interest. 569 S.W.2d at 487. The court, however, held that it was the statutory rate of interest that applied; noted several instances in which the statutory rate had been applied, and adopted that rate in *Stahl*. This hold-

ing is directly contrary to the holding of the Kansas Supreme Court. The incorrect forecast by the Kansas Supreme Court in *Shutts I* resulted in a judgment being rendered against this non-resident defendant, in favor of non-resident plaintiffs, in an amount greater than was owed. The due process clause acting as an instrument of interstate federalism and acting to ensure the "orderly administration of the laws," should prevent such a result. *See, International Shoe Co. v. Washington*, 326 U.S. at 319.

An alternative choice of law might itself have constitutional implications. For example, the application of Kansas law to transactions unrelated to this state might violate constitutional provisions:

> [F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.

Allstate Ins. Co. v. Hague, 449 U.S. 302, 101 S. Ct. 633, 66 L. Ed. 2d 521, 531 (1981).

Even assuming the existence of a common fund, the mere presence of Phillips in this jurisdiction, without more, does not provide a sufficient basis for exercising jurisdiction over the "common fund" purportedly held by Phillips. The fiction that "a debt follows the debtor" is not a constitutionally sound basis for exercising jurisdiction. *Rush v. Savchuk*, 444 U.S. at 330, 62 L. Ed. 2d at 526. Indeed, this basis for binding Phillips and unnamed class members is foreclosed by the holding of both *Shaffer v. Heitner* and *Rush v. Savchuk*. The presence of property in a forum unrelated to the litigation was an insufficient basis for asserting jurisdiction.

The holding of *Rush v. Savchuk* reaffirms the holding of *Shaffer v. Heitner*, and strongly supports the position taken by Phillips. In *Rush*, the Supreme Court held that the mere presence of an asset in the forum jurisdiction did not provide an adequate basis for adjudicating the rights of the non-resident owner of that asset. If, in fact, there is some "common fund" held by Phillips, the mere presence of Phillips in a state does not make that state the situs of the common fund. If this fiction were viable, the "common fund" would have a situs in all 50 states in which Phillips has a registered agent and is authorized to do business. Were this fiction constitutionally sufficient, each of the 50 states would have a sufficient interest in resolving this dispute.

The requisite nexus between the forum and the claims of the non-residents is absent. These plaintiffs are not residents of Kansas, so Kansas courts have no "manifest interest in providing effective means of redress for its residents . . . ." Compare *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 2 L. Ed. 2d 223, 78 S. Ct. 199, *Hanson v. Denckla*, 357 U.S. 235, 251-53, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958), and *International Shoe, supra*, 326 U.S. at 319, 66 S. Ct. 154. The cause of action did not arise in the forum so the forum state has no interest in regulating the activity of the defendant vis-a-vis the non-resident plaintiffs. *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 70 S. Ct. 927, 94 L. Ed. 1154 (1949). *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 305, 62 L. Ed. 2d 490, 506, 100 S. Ct. 559 (1980) (Brennan, J. dissenting) ("The state has a legitimate interest in enforcing its laws designed to keep its highway system safe . . . .") Since the cause of action did not arise in Kansas, necessary witnesses may have to be brought into the forum. *Cf. McGee v. International Life*

Ins. Co., 355 U.S. 220, 223, 2 L. Ed. 2d 223, 226, 78 S. Ct. 199. The denial of this forum impairs neither the non-residents interest in obtaining convenient and effective relief, see *Kulko v. California Superior Court*, 436 U.S. 84, 92, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978), nor the non-residents power to choose their own forum. *Cf. Shaffer v. Heitner*, 433 U.S. 186, 211 n. 37, 53 L. Ed. 2d 683, 702, 97 S. Ct. 2569 (1977). The present forum was determined by the totally adventitious presence of three named plaintiffs with somewhat similar claims to those of unnamed non-resident plaintiffs.

Dismissal of the claims of non-residents will not deprive them of a forum in which to litigate their claims. The importance of such an alternative forum was recognized by the Kansas Supreme Court. *See Shutts I*, 222 Kan. at 550. In fact, two of the present named plaintiffs in *Shutts II* are residents of Oklahoma and initially brought an identical suit in Oklahoma, but voluntarily dismissed the suit. In virtually every way, Oklahoma is a better forum for this case. The principal place of business of Phillips Petroleum Co. is Bartlesville, Oklahoma. Access to proof will be easier in Oklahoma than in Kansas. Oklahoma has a substantially larger number of leases, royalty owners and potential claims than Kansas. Oklahoma has a legitimate interest in regulating the conduct of Phillips vis-a-vis non-resident persons. The decision of these non-resident plaintiffs to reassert this case in this state smacks of impermissible forum-shopping.

Moreover, the Oklahoma Procedural Rules governing class actions address the due process problems in a much better way than do the Kansas Statutes. The Oklahoma Statutes provide for an "opt-in" method in place of the Kansas "opt out" provision. Under the Oklahoma procedures, a class member who wishes to voluntarily enter

an action must unmistakably manifest his or her desire to do so by a specific affirmative act. This affirmative assent to jurisdiction satisfies due process even under the most rigorous standards. The voluntary consent to be bound makes unnecessary the application of the minimum contacts test. The consent itself is a sufficient "affiliating circumstance" between the non-resident and the forum to justify the forum in hearing and deciding the case.

IV. SUBSEQUENT UNITED STATES SUPREME COURT PRONOUNCEMENTS HAVE OVERRULED *SHUTTS I*

Pronouncements of the United States Supreme Court subsequent to *Shutts I* have indicated that the jurisdiction issue in *Shutts I* was incorrectly decided, or is no longer a correct statement of the law. In 1980, the Supreme Court again stated that "*all assertions of state court jurisdiction* must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Rush v. Savchuk*, 444 U.S. 320, 327, 62 L. Ed. 2d 516, 100 S. Ct. 571 (1980), *quoting*, *Shaffer v. Heitner*, 433 U.S. at 212. Phillips submits that this statement is as applicable to non-resident plaintiffs not voluntarily before the court as it is to non-resident defendants. The minimum contact must be met with each individual whose rights are sought to be adjudicated. *See Rush v. Savchuk*, 444 U.S. at 332, 62 L. Ed. 2d at 527.

The opt-out procedure, which requires a non-resident plaintiff to take affirmative steps to avoid the assertion of jurisdiction cannot constitutionally create a sufficient basis for assuming jurisdiction over the individual. A state court which *ab initio* lacks jurisdiction over a non-resident does not have the power to compel such non-resident to take affirmative steps to avoid the assertion

of jurisdiction. The "unilateral activity of those who claim some relationship with a non-resident" cannot satisfy the requirements of due process. *Hanson v. Denckla*, 357 U.S. at 253, 2 L. Ed. 1283, 78 S. Ct. 1228; *World-Wide Volkswagen v. Woodson*, 444 U.S. at 298, 62 L. Ed. 2d at 502. The named plaintiffs' activities in Shutts II, in bringing the suit and in causing issuance of notice and requests for exclusion are each "unilateral activities." The opt-out procedure should again be compared to the opt-in procedures used in Oklahoma. The affirmative act required by an opt-in statute is not subject to these criticisms. An affirmative manifestation of an assent to be bound is an unambiguous consent to jurisdiction. It is not the result of unilateral activities of someone claiming a relationship with the non-resident.

The Kansas Supreme Court held in *Shutts I* that the interest which Kansas residents have in common with non-residents in recovering damages for Phillips' withholding of royalties, constitutes a "contact" between the non-residents and Kansas. 222 Kan. at 558. The strength of this "contact" is questionable at best. Indeed, it is doubtful that this type of contact could constitutionally satisfy the due process requirements. Again, this type of activity is "unilateral activity of those who claim some relationship with a non-resident." Even disregarding this shortcoming, and assuming the existence of a "contact" between the non-residents and Kansas, the nature of this contact will not satisfy due process standards. The "contact" found was the "common" interest in a purported "common fund." Yet, there was no showing of the situs of that fund. Both *Shaffer v. Heitner* and *Rush v. Savchuk* foreclose premising jurisdiction on the basis that the holder of the fund can be found within the jurisdiction. The clear constitutional requirements cannot be met in this case.

As a matter of comity and federalism, this state should not certify a nation-wide class and enter judgment as to the claims of non-residents since that judgment will not be honored in all other states. It is clear that Pennsylvania and New Jersey believe that a state court cannot exercise jurisdiction over claims of non-resident class members who have no "contacts, ties or relations" with the state. *See Klemow v. Time, Inc.*, 466 Pa. 189, 352 A.2d 12, *cert. denied*, 429 U.S. 828 (1976); *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976). A judgment entered in Kansas would appear to be unenforceable in either of those states. Moreover, there is no clear holding in Oklahoma, or Texas, or any of the other states in which leases are located as to whether those courts would recognize a judgment in this case. *See Hall v. Helicopteros Nationales de Columbia, S.A.*, 25 Tex. S. Ct. J. 190 (2/24/82) (a copy attached). It is thus possible that the efforts of the Kansas courts in resolving this dispute would be little more than an academic exercise, and the results obtained would be ignored by the states most affected.

The Kansas Supreme Court's holding in *Shutts I* does not give the requisite deference to the role of federalism, and more specifically, the importance territory plays in considerations of jurisdiction. The importance of this factor can be seen by the discussion accorded it in *World-Wide Volkswagen v. Woodson* and *Rush v. Savchuk*. These decisions handed down after the Kansas Supreme Court's decision in *Shutts I* demonstrate that the holding of the Kansas Supreme Court has been overruled. This Court should require the District Court Judge to eliminate from the class the unnamed non-resident class members.

CONCLUSION

The plaintiffs in Shutts II, two of them non-residents, chose to bring this lawsuit in a forum which is largely disinterested in the resolution of this dispute. Indeed, these two non-resident plaintiffs chose to dismiss a case brought in the most appropriate forum in which to litigate this claim. If the Court finds, as Phillips has demonstrated in this brief, that a nation-wide class is inappropriate, the plaintiffs will still be free to return to the best forum in which to litigate this dispute. The existence of an alternative forum, more convenient to the named plaintiffs, and much more interested in resolving this dispute, should dispel any spector that failing to certify a nation-wide class would work a hardship on anyone.

The assertion of the class action in this forum results in this claim violating the rights of Phillips and the rights of non-resident plaintiff class members. The constitutional requirement that the state have some interest in this action is not fulfilled. This deficiency results in a denial of due process to both Phillips and the unnamed plaintiff class members. Justice for non-resident plaintiffs can best be found in these non-residents' home states. Limitation of this class will serve the interests of justice. The Court should issue the requested writ.

Respectfully submitted,

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By /s/ Joseph W. Kennedy
Joseph W. Kennedy

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EXHIBIT "B"

IN THE
DISTRICT COURT OF SEWARD COUNTY, KANSAS

Case No. 79-C-113

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinions Nos. 699, 699H, 749, 749C, 770 and 770A,
Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

AFFIDAVIT NO. 4

STATE OF OKLAHOMA)
) SS.
COUNTY OF WASHINGTON)

C. A. Roberts, of Bartlesville, Oklahoma, being first duly sworn, deposes and states under oath the following facts:

1. That the following is based on Affiant's own personal knowledge, and is submitted for use and for any lawful purpose on behalf of defendant Phillips Petroleum Company in the above styled and numbered case (hereinafter called *"Shutts II"*).

2. That Affiant is: an employee of Phillips Petroleum Company where he serves as gas royalty administrator;

and that he has had that position since 1974; and that the duties of such position included responsibility for coordinating the payment of additional monies to Phillips' royalty owners (i.e., Phillips' lessors, outside lessors to whom Phillips accounts, and all overriding royalty interest owners) following the finality of Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A.

3. That Affiant has requested and received an unaudited summary of the additional monies paid which shows for each Opinion: (1) the number and the domicile of the leases to which the money is attributed and the amounts attributed by state; and (2) the number and the domicile of the payees of the money and the amounts paid by state. These summaries were derived from the accounting business records of Phillips Petroleum Company. The summary of said information appears as Attachments A and B.

4. Further affiant saith not.

/s/ C. A. Roberts
C. A. Roberts

Sworn to and subscribed before me this 1st day of April, 1982.

/s/ Patsy Graham
Notary Public

My commission expires: June 22, 1984.

Attachment A

PHILLIPS PETROLEUM COMPANY

Represents a schedule of values applicable to leases domiciled by
State Federal Power Commission Opinion Nos. 699, 749 and 770

Lses. Domicile	Opinion 699		Opinion 749		Opinion 770	
States	# Owners	Value	# Owners	Value	# Owners	Value
Oklahoma	1,266	$ 83,711.35	1,948	$ 243,163.49	1,430	$ 471,122.53
Texas	4,414	839,152.73	3,479	2,171,217,36	3,702	2,615,744.46
Kansas	3	152.88	15	2,619.24	4	115.10
Arkansas	6	3,228.22	32	1,769.33	2	552.83
Louisiana	68	2,187,548.06	178	352,539.45	26	516,248.13
New Mexico	941	433,574.85	350	22,670.27	591	194,799.95
Illinois	—	—	1	1.30	1	.01
Wyoming	690	148,906.93	68	67,570.01	476	945,441.09
Mississippi	—	—	3	694.93	—	—
Utah	—	—	1	184.60	—	—
W. Virginia	—	—	32	10,364.61	—	—
No State Code	1	[.05]	2	1,032.59	—	—
	7,389	$3,696,274.97	6,109	$2,873,827.18	6,232	$4,744,024.10

Attachment B

PHILLIPS PETROLEUM COMPANY

Represents a schedule of values paid and/or accrued to owners pursuant to Federal Power Commission Opinion Nos. 699, 749 and 770 Domiciled by Location

State	Opinion 699		Opinion 749		Opinion 770	
	# Owners	Value	# Owners	Value	# Owners	Value
Alaska	33	$ 1,261.15	14	$ 97.55	20	$ 399.76
Alabama	45	4,553.13	44	886.70	39	3,178.19
Arizona	226	14,930.86	206	12,579.62	207	23,427.35
Arkansas	173	2,399.71	171	7,764.09	162	8,967.61
California	1,604	46,702.19	1,374	55,341.35	1,331	178,190.28
Colorado	505	189,660.33	367	88,652.58	485	164,784.52
Connecticut	54	507.02	86	1,143.92	56	2,449.32
Dist./Columb.	47	1,064.66	45	536.56	39	6,862.53
Delaware	31	10,457.02	18	212.48	19	237.04
Georgia	45	1,377.18	50	2,310.43	43	2,068.09
Florida	272	9,260.13	307	28,603.17	239	8,649.57
Hawaii	5	10.92	14	235.71	11	191.54
Iowa	182	2,344.80	180	12,682.50	176	6,237.64
Idaho	24	424.90	23	402.11	26	1,900.86
Illinois	397	25,090.75	357	36,473.09	353	44,312.58
Indiana	87	786.52	80	10,028.69	74	2,385.15
Kansas	496	9,281.75	553	37,818.00	504	75,538.65
Kentucky	47	584.46	50	111.73	43	956.65
Louisiana	1,244	1,688,366.22	740	246,607.09	361	434,741.61
Massachusetts	56	821.82	42	3,450.80	35	3,738.12
Maryland	52	3,660.63	49	1,413.34	49	4,204.97
Maine	11	92.51	11	3.18	4	458.05
Michigan	75	6,245.84	65	5,916.08	68	4,355.96
Minnesota	104	3,072.74	69	2,297.24	87	5,098.68
Missouri	276	13,840.43	269	54,601.95	240	72,234.27
Mississippi	67	6,069.39	88	1,327.41	36	16,649.38
Montana	53	1,521.94	22	316.85	32	1,483.82
N. Carolina	61	2,248.09	39	1,110.52	39	1,158.65
N. Dakota	8	17.60	5	69.39	8	475.47

Attachment B (Continued)

PHILLIPS PETROLEUM COMPANY

Represents a schedule of values paid and/or accrued to owners pursuant to Federal Power Commission Opinion Nos. 699, 749 and 770 Domiciled by Location

State	Opinion 699		Opinion 749		Opinion 770	
	# Owners	Value	# Owners	Value	# Owners	Value
Nebraska	86	$ 1,399.95	43	$ 2,326.33	72	$ 7,306.08
New Hampshire	11	307.83	11	502.38	10	542.58
New Jersey	72	977.67	117	994.62	66	7,840.84
New Mexico	621	315,856.87	339	26,535.79	469	157,151.47
Nevada	56	1,516.14	49	2,143.52	51	3,753.41
New York	498	50,952.57	469	16,541.33	388	44,093.58
Ohio	84	837.33	105	4,166.51	74	6,844.23
Oklahoma	2,653	191,587.09	3,591	575,513.32	2,684	573,614.01
Oregon	135	2,562.96	111	2,253.51	123	14,484.55
Pennsylvania	192	2,233.57	159	4,412.98	160	1,353.29
Puerto Rico	—	—	—	—	—	—
Rhode Island	10	35.82	15	2.19	8	602.15
S. Carolina	29	410.57	27	660.43	24	309.35
S. Dakota	24	514.35	19	68.04	18	3,131.68
Tennessee	74	16,353.07	53	2,009.66	45	1,803.87
Texas	9,591	940,100.88	7,881	1,521,407.32	8,550	2,216,033.23
Utah	29	1,518.84	18	354.93	18	4,626.62
Vermont	8	96.63	11	248.38	7	939.07
Virginia	78	989.98	84	2,290.36	71	1,893.22
Virgin Islands	—	.28	1	22.50	1	.30
Washington	143	3,327.72	131	2,992.82	135	27,971.93
Wisconsin	87	929.22	89	5,740.29	88	13,926.50
W. Virginia	20	5,374.18	246	7,118,14	22	294.64
Wyoming	413	79,232.83	37	52,091.05	272	552,104.63
Foreign	109	2,436.82	69	761.81	110	828.33
	21,303	3,666,207.86	19,013	2,844,152.34	18,252	4,716,785.87
Unmatched Owners	1,025	30,067.11	1,553	29,674.84	1,046	27,238.23
	22,328	$3,696,274.97	20,566	$2,873,827.18	19,298	$4,744,024.10

(Filed August 7, 1979)

IN THE
DISTRICT COURT OF SEWARD COUNTY, KANSAS

Case No. 79-C-113

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinions Nos. 699, 699H, 749, 749C, 770 and 770A,
Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

ANSWER, PRETRIAL MOTION AND COUNTERCLAIM

I.

ANSWER

COMES NOW the defendant Phillips Petroleum Company (Phillips) and for its answer to the plaintiffs' Petition alleges and states:

1. Phillips admits the allegations of paragraph 1 of the Petition.

2. Phillips denies the allegations of paragraphs 2 through 10 of the Petition except it is admitted that certain funds were disbursed by Phillips in accordance with Federal Power Commission Opinions Nos. 699, 699H, 749, 749C, 770 and 770A.

3. The Court is without jurisdiction of this purported nationwide class action. There is not a sufficient nexus between the State of Kansas and the claims alleged in the plaintiffs' Petition to confer jurisdiction upon the courts of the State of Kansas. Any such attempted exercise of jurisdiction by the courts of the State of Kansas would violate the laws of the State of Kansas, the Constitution of the State of Kansas, the Constitution of the United States of America and the Constitutions and Laws of the various states of the Union whose citizens and residents may have or claim some interest in the proceeding.

4. This action is not an appropriate class action, even if the Court had jurisdiction over said action, for the following reasons:

A. The claims of the named plaintiffs are not typical of the claims of the alleged class in that different legal relationships exist between the defendant and each of the purported class members. Phillips alleges that it has separate and distinct contractual relationships with each purported member of the alleged nationwide class and that each such member's rights and obligations are, and must be, initially determined in the context of its contractual relationship with the defendant. Since the contractual relationships vary widely in form and content, the claim of any particular purported class member is not typical with the claims of all other purported class members.

B. There is no common question of law that is common to all the members of the class. Each class member's right to relief is dependent not only upon his own particular fact situation but also upon the law of the jurisdiction wherein the said class member's alleged cause of action arose. The law in the

various states, with respect to the obligations of Phillips and the purported class members, varies considerably from state to state and therefore no common question of law exists.

C. There is no common question of fact which is common to all of the class members. As hereinbefore alleged each class member's claim is dependent upon his particular contractual relationship with Phillips and his right to relief is dependent upon that particular fact situation together with the particular law of the state in which such claim arose.

D. The named plaintiffs are not adequate representatives of the class which they purport to represent. As hereinbefore alleged, significant factual and legal differences with respect to each plaintiff are present and it may be in the interest of some class members to proceed on theories of recovery which would be inimical to the interests of the named class plaintiffs. Furthermore, the named class plaintiffs purport to represent a class not only of royalty owners but also of producers of natural gas although they themselves are not producers of natural gas and occupy a significantly different legal relationship to Phillips than do the producers. In many instances the producers themselves have relieved Phillips of any possible claim by the royalty owners and therefore claims and counterclaims may exist between the royalty owners on the one hand and the producers on the other hand. Because of such inherent conflicts between the positions of the two groups it is not ethically or legally possible for the named plaintiffs to represent a group composed of both competing interests.

5. Some or all of the claims of the plaintiffs and the purported class members are barred because of the con-

tractual relationship existing between Phillips and the particular plaintiff or purported class member. For example, certain purported class members have specifically contracted with Phillips to allow Phillips to retain, without interest, any additional money associated with Federal Power Commission (FPC) action regarding proposed gas price rate increases. Other purported class members, and again by contracts with Phillips, have specifically released Phillips from any liability for interest on the additional money paid by Phillips after final FPC action on the several pending gas price rate increase requests.

6. The additional monies paid out by Phillips pursuant to the three FPC Opinions (Nos. 669, 770 and 749) related to the full time period covered by said Opinions. However, Phillips did not receive the monies collected subject to refund pursuant to said Opinions until after the effective dates of the Opinions. Phillips denies that it either had posession of, or used, any of the so-called "suspense monies", on which the plaintiffs and purported class members claim interest is due, at any time prior to the actual receipts of the various monies collected subject to refund by Phillips.

7. Philips offered to pay to the plaintiffs and to the members of the purported class an amount equal to the sums collected by Phillips subject to refund, as the same were received, on the condition that the recipient of the monies would agree to refund to Phillips such amounts as were ultimately determined by the Federal Power Commission (FPC) to have been paid in excess of the just and reasonable rate. Substantial numbers of producers and royalty owners accepted this offer and thereafter currently received the additional money. Phillips' offers to make such payments have been judicially held to bar a subsequent claim for interest on the funds held

by Phillips from and after the date of the offer and without regard to whether or not the offer was subsequently accepted. This rule should be applicable, under the facts in this case, to all plaintiffs and purported class members. Accordingly, the interest claims of the plaintiffs and the purported class members are barred as a matter of law and/or on equitable grounds.

8. Following Phillips' offers to pay the money collected subject to possible refund to the plaintiffs and purported class members, some specifically directed Phillips not to pay them said money until such time as all FPC action was final. The interest claims of all those who did are barred.

9. Some or all of the claims asserted by plaintiffs and the purported class members are either barred or are not recognizable under the laws of the various jurisdictions wherein the alleged causes of action arose. It is alleged that the merits of the interest claim of each purported class member must be determined in accordance with the law of the state in which the alleged cause of action arose.

10. Some or all of the claims asserted by the plaintiffs and purported class members are barred by the appropriate statutes of limitation and/or by the doctrine of laches, and/or by the doctrine of res judicata.

11. Some or all of the claims asserted by the plaintiffs and purported class members are barred by the defenses of Accord and Satisfaction, and/or Compromise and Settlement, and/or Estoppel, and/or Payment, and/or Release, and/or Waiver.

12. Phillips denies that it is liable for interest in any amount to any person or entity but alleges, in the alternative, that if such interest is awarded by the Court

then the rate of such interest should be determined by the laws of the various states wherein the particular cause of action for said person or entity arose, and such interest should be computed on only those amounts of money actually received by Phillips, and only from and after the actual dates of the receipt of said money by Phillips.

WHEREFORE, having fully answered, the defendant Phillips Petroleum Company prays that this action be dismissed and that defendant have judgment herein for its costs.

II.

PRETRIAL MOTION

Pursuant to K.S.A. 60-212(d), Phillips moves the Court to hear and determine before the trial of the principal case, and prior to action by the plaintiffs for class certification, the defense contained in paragraph 3 of the foregoing Answer for the reason that if said defense is decided in the favor of Phillips, this action should be dismissed in whole or in part.

III.

COUNTERCLAIM

COMES NOW Phillips Petroleum Company (Phillips) and for its counterclaim against the plaintiffs and the purported class members herein alleges and states:

1. At all times relevant to this action, Phillips was a producer of natural gas subject to the provisions of the Natural Gas Act and the Federal Power Commission (now the Federal Energy Regulatory Commission). Phillips not only produced gas from leases in which it was the lessee but also purchased natural gas in the ordinary

course of its business and made royalty distribution pursuant to a wide variety of contractual arrangements.

2. To the extent that Phillips has overpaid any monies to plaintiffs or any members of the purported plaintiff class in this action then Phillips claims a right to set off such amounts of overpayment against any sums found to be due from Phillips to said class.

3. To the extent Phillips performed royalty accounting functions and made the royalty disbursements on behalf of other natural gas producers, at their direction, or lack thereof, Phillips is entitled to be indemnified by such producers for any loss or liability which Phillips sustains herein.

4. As a setoff, Phillips is entitled to recover from the plaintiffs and all members of the purported plaintiff class herein for their proportionate share of administrative costs and expenses incurred by Phillips on behalf of said persons or entities in obtaining higher prices for gas over the years. This would include the right to recover those administrative costs, expenses and attorneys fees not only in proceedings culminated in FPC Opinions Nos. 699, 699H, 749, 749C, 770 and 770A but also all other Federal Power Commission or Federal Energy Regulatory Commission proceedings from June 1, 1954 to the present time.

5. In the event, and only in the event, that the Court determines that Phillips is liable for interest, Phillips is entitled to recover, from all producers within the purported plaintiff class, interest on any and all additional money paid by them to Phillips pursuant to FPC Opinions Nos. 586, 699, 699H, 749, 749C, 770 and 770A.

6. Phillips specifically reserves the right, in the event, and only in the event, that this case is certified

as a class action, and after the membership of the class is made up, to plead further and more specific counterclaims against any and all class members who elect to be bound by the decision in this case. Until such time as the class is established Phillips cannot be more definitive about what such counterclaim will be, or against what persons or entities they will be plead.

WHEREFORE, having fully answered, Phillips prays for judgment in accordance with the foregoing allegations, for all costs, for attorney fees and expenses, for prejudgment interest, and for all other proper relief at law or in equity.

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Attorneys for Defendant
Phillips Petroleum Company

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Answer, Pretrial Motion and Counterclaim was mailed in the United States mail, postage prepaid, to the attorneys of record for the plaintiffs as shown below this 7th day of August, 1979:

W. Luke Chapin
Chapin, Penny & Goering
Chapin Building
Medicine Lodge, KS 67104

Ed Moore
Ginder, Moore & McLaughlin
202 S. Grand
Cherokee, OK 73728

/s/ Richard R. Yoxall

KAN. STAT. ANN. § 60-223

Class actions. (a) *Prerequisites to a class action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class actions maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) The inter-

est of members of the class in prosecuting or defending separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against members of the class; (C) the appropriate place for maintaining, and the procedural measures which may be needed in conducting, a class action.

(c) *Determination by order whether class action to be maintained; judgment; actions conducted partially as class actions.*

(1) As soon as practicable after the commencement and before the decision on the merits of an action brought as a class action, the court shall determine by order whether it is to be maintained as such. Where necessary for the protection of a party or of absent persons, the court, upon motion or on its own initiative at any time before the decision on the merits of an action brought as a non-class action may order that it be maintained as a class action. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) The judgment in an action maintained as a class action shall extend by its terms to the members of the class, as defined, whether or not the judgment is favorable to them.

In any class action maintained under subdivision (b) (3), the court shall exclude those members who, by a date to be specified, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor. To afford members of the class an opportunity to request exclusion, the court shall direct that reasonable notice be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class.

(3) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues such as the issue of liability, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this section shall then be construed and applied accordingly.

(d) *Orders in conduct of actions.* In the conduct of actions to which this section applies, the court may, without limitation, make appropriate orders: (1) Settling the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, or to include such allegations, and that the action in either case proceed accordingly. The orders may be combined with an order under K.S.A. 60-216, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or compromise.* An action brought as a class action, whether or not ordered to be maintained as provided in paragraph (1) of subsection (c), shall not be dismissed or compromised without the approval of the court, and the court in its discretion may order that notice of a proposed dismissal or compromise be given to the class in such manner as the court may direct.

UNIFORM CLASS ACTION ACT

Section 6. [Jurisdiction over Multi-State Classes]

[(a)] A court of this State may exercise jurisdiction over any person who is a member of the class suing or being sued if:

[(1)] a basis for jurisdiction exists or would exist in a suit against the person under the law of this State[;] [or]

[(2) the state of residence of the class member, by class action law similar to subsection (b), has made its residents subject to the jurisdiction of the courts of this State.]

[(b) A resident of this State who is a member of a class suing or being sued in another state is subject to the jurisdiction of that state if by similar class action law it extends reciprocal jurisdiction to this State.]

Comment

The reach of the court under this Act is restricted by both constitutional and statutory rule limitations. Persons beyond the court's reach may be able to participate in a plaintiff class action by intervention under provisions similar to Federal Rule 24 which exists in most states.

The court in deciding whether to certify the action as a class action is to consider the conflict of laws problems which may be involved. (See Section 3(12).) Those problems may exist because of the possibility of bringing the action in a jurisdiction other than that in which the operative facts occurred and because of the reach of the court under this section beyond the state in which the court is sitting.

The bracketed subsections of Section 6 incorporate reciprocal provisions which would allow a state to exercise jurisdiction in a sister state if that state has a reciprocal grant of power. There is some precedent for this sort of provision. (See, for example, the Uniform Certification of Questions of Law [Act] [Rule], the Uniform Foreign Depositions Act, and the Uniform Mandatory Disposition of Detainers Act.)

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

In compliance with this Court's Rule 28.1., a list of corporations in which Phillips Petoleum Company holds less than a 100% interest follows: Acurex Corporation; Aero Oil Company; Alyeska Pipeline Service Company; Arctic LNG Transportation Company; Bonny LNG Limited; Bruin Carbon Dioxide Sales Corporation; Calatrava Empress Para la Industria, Petroquimica, S.A.; Canada Western Cordage Co., Ltd.; Canyon Reef Carriers Inc.; Chisholm Pipeline Company; Cochin Refineries Ltd.; Colonial Pipeline Company; Comagnie Francaise du Carbon Black S.A.; Dixie Pipeline Company; Drisco S.A. de C.V.; Everglades Pipeline Company; Explorer Pipeline Company; Insurance and Reinsurance Brokers, Ltd.; Iranian Marine International Oil Company; Kaw Pipe Line Company; Kenai LNG Corporation; LeeFac, Inc.; Negromex S.A.; Newmont Mining Corporation; Nordisk Philblack AB; Norland GmbH; Norpipe A/S; Norpipe Petroleum U.K. Ltd.; Norsea Gas A/S; Norsea Gas GmbH; Norsea Pipeline Ltd.; Papago Chemicals, Inc.; Petrochim; Phillips Carbon Black Limited; Phillips Carbon Black Company (Pty.) Ltd.; Phillips Carbon Black Italiana S.P.A.; Phillips Gas Supply Corporation; Phillips Imperial Petroleum Limited; Phillips Pacific Chemical Company; Phillips Petroleum Singapore Chemicals (Private) Limited; Philmac Oils Limited; Plasticos Vanguardis S.A.; Polar LNG Shipping Corporation; Polyolefins; Quimica Veneco C.A.(b); Renolit Fertighaus GmbH; Salk Institute Biotechnology Industrial Assoc. Inc.; Seadock, Inc.; Seaway Pipeline Inc.; Sevalco (Holdings) Limited; SPODCO Ltd.; Venezoil, C.A.; Texas Offshore Port, Inc.; Transatlantic Reinsurance; Western Desert Operating Petroleum Company; White River Shale Oil Corporation.

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No. 82-461

In the Supreme Court of the United States

October Term, 1982

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

KEATON G. DUCKWORTH, District Judge, 26th Judicial District, IRL SHUTTS, and ROBERT ANDERSON and BETTY ANDERSON, Individually, and as representatives of all royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770, and 770A,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

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Date: October 15, 1982

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QUESTIONS PRESENTED

1. Can Phillips Petroleum Company, the defendant in a plaintiff class action, assert due process rights of nonresident plaintiff class members?

2. If so, does a state court violate the due process rights of plaintiff class members who are nonresidents of Kansas by including them in plaintiff class after they have been given first class mail notice and failed to file written exclusion?

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Class Order of the trial court is as shown in the Petition, A2 to A9. The denial by the Supreme Court of Kansas of the Petition for Mandamus is as shown in the Petition, Page A1.

JURISDICTION

Although the Class Order of the trial court is not a final order and neither is the denial of Writ of Mandamus by the Supreme Court of Kansas a final order, this court may review due process rights of parties, in a proper action, pursuant to 28 U.S.C. Sec. 1257(3).

STATEMENT OF THE CASE

Phillips first attempted to use its royalty owners' money without payment of interest as set forth in *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978). That case will be referred to hereinafter as *Shutts I.* According to the Petition in this case, *Shutts II*, Phillips again withheld and used its royalty owners' money while various appeals from FERC rulings were pending and later paid out the monies without paying or offering to pay any interest for their use.

Action was originally filed in July, 1979, to include producers as well as royalty interest owners to whom Phillips made payment of suspended monies (see copy of Petition beginning at Appendix, Page A1 and copy of Plaintiffs' Motion to Certify the Class at A15) but the trial court excluded producers from the class and included only royalty owners and overriding royalty owners, just as in *Shutts I.* (See Class Order at Petition Appendix A2 to A9.)

Phillips did not attempt interlocutory appeal from the trial court's Class Order but, instead, attempted to use mandamus to compel the trial court to limit class members to residents of Kansas only.

This attempt has been made even though (1) there are many nonresidents of Kansas who own royalty interests under Kansas oil and gas leases; (2) plaintiff Shutts, a Kansas resident, owns royalty interests under Phillips leases in Texas and Oklahoma; and (3) the trial court required first class mail notice to all class members, which notice has been given. Copy of plaintiffs' Motion to Dismiss Petition for Writ of Mandamus in the Supreme Court of Kansas is attached at Appendix, page A21.

ARGUMENT

I. The Due Process Rights of Non-Kansas Members of the Plaintiff Class Cannot Be Properly Asserted by Phillips and the Fourteenth Amendment Issues Raised by Phillips Are Not Ripe for Review by This Court.

A. Phillips Cannot Represent Its Adversaries.

Phillips contends the Kansas state trial court lacks personal jurisdiction over nonresident members of the plaintiff class, and therefore the court cannot adjudicate their respective rights to interest against Phillips without violating their rights to due process. As a general rule, however, "one may not claim standing in this court to vindicate the constitutional rights of some third party." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976), quoting *Barrows v. Jackson*, 346 U.S. 249, 255 (1953). The purpose behind this rule is twofold:

> "First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in court litigant is successful or not. . . Second, third parties themselves usually will be the best proponents of their own rights." (*Singleton v. Wulff*, 428 U.S. at 113-114.)

In this case, plaintiffs already have given first class mail notice to more than 33,000 class members, most of them being nonresidents of the State of Kansas. Phillips, in its Petition at Appendix A6 to A8 shows the notice that was given to the class members but for some reason does not show the exclusion form which was a crucial part of the notice. It is as follows:

REQUEST FOR EXCLUSION

to the Clerk of the Court:

The undersigned respectfully requests to be excluded from the plaintiff class members in this case in accordance with the terms of the Notice of Pendency of Class Action dated June 15, 1982.

Dated ....., 1982.

Send to:

Clerk of the Court
415 N. Washington
Liberal, Kansas 67901

Signature: .....

Pri. Name: .....

Address: .....

.....

Approximately 3,348 of the class members have signed and returned the exclusion form to the Clerk of the District Court of Seward County, Kansas.

Thus, a substantial number of the class members have exercised their right to exclude themselves from the action. The balance of the class members are in a direct adversary relationship to Phillips.

Even though Phillips paid out some of the suspense monies involved in this case more than five years ago, and even though *Shutts I* was decided by the Kansas court more than five years ago, there are no actions pending in any other state court or federal district court for the collection of interest on the suspense monies from Phillips. If Phillips royalty owners are to recover interest on suspense monies as they did in *Shutts I*, then this probably is the only case where there is any likelihood of their recovering such interest.

Phillips' argument in behalf of nonresident plaintiff class members, therefore, is of doubtful validity. Phillips by attempting to eliminate nonresident members of the

class is attempting to eliminate most of its liability. It is not really interested in the rights of nonresident plaintiff class members except to eliminate such liability. The members who have stayed in the class have stayed in after due notice and because they want to collect the interest which is due them. They are represented by the named plaintiffs and by attorneys for the plaintiff class, not by Phillips. Phillips should not be heard in this court as a representative of the due process rights of members of the plaintiff class.

Phillips claims that "nonresident plaintiffs have not chosen Kansas as the forum." (Petition, page 10.) Not so. Nonresident plaintiffs have chosen Kansas as the forum by electing to stay in the case rather than to exclude themselves.

Phillips, by seeming to argue the case as though the judgment were unfavorable to plaintiff class, attempts to present a hypothetical case that does not exist. Phillips is not arguing for nonresident class members but for itself. If the Kansas court follows the judgment in *Shutts I*, and it is presumed that it will, judgment granted to members of the plaintiff class will allow them everything that suit is filed to secure. It is far too tenuous to assume first, a dissatisfied class member exists; second, if he does exist, he will try to relitigate his claim, having secured by Kansas judgment all he could possibly obtain; and third, if he tries to relitigate the claim, the forum court will find he was not bound by the Kansas court judgment.

This brief represents both residents and nonresidents in opposition to the Petition for Certiorari. The nonresident members do not want to be excluded. They do not want Phillips arguing "for" them. They want to be left in the case and have the benefits of the judgment we anticipate they will obtain.

B. The Due Process Claims Raised by Phillips Are Not Ripe for Review by This Court. This Case Presents No Issue of Parallel or Conflicting Class or Individual Actions; No Collateral Attacks of an Unfavorable Final Adjudication; No Forum Shopping; No Disruption of Individual State Regulations or Administrative Procedures; No Deprivation of a Prospective Plaintiff's Right to Have His Claim Adjudicated in Another Forum or Under Another State's Laws.

The most that Phillips can allege at this point is that if the plaintiff class does not prevail and obtain judgment, then nonresident class members will have been deprived of their claims *against* petitioner without due process of law. If Phillips were really worried about prospective due process denials to plaintiff class, it could pay the claims and prevent the worry.

Speculative claims of future harm ought not to be addressed by this court until such harm occurs. (*Golden v. Zwickler*, 394 U.S. 103 (1969), particularly where such claims are based on issues of constitutional significance. (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 346-48 (1936).)

As discussed below, this court has ruled many times on the question of whether a judgment in a plaintiff class action would be binding upon class members who were not residents of the forum state. (See, *Hansberry v. Lee*, 311 U.S. 32 (1940); *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Hartford Life Insurance Co. v. Barber*, 245 U.S. 146 (1917); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531

(1915); *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662 (1915).) Each of those decisions arose within a firm factual framework, i.e., a class member seeking to enforce or attack a judgment in the court of a sister state, and in each case the due process issues were raised by a party whose rights had been adjudicated in his absence. However, it was held that such party was bound as a class member.

In the present posture of this case, the only issue is whether the due process rights of a third party would be violated by the mere act of a court denying a motion of the defendant not to certify as to nonresident members of the plaintiff class. No property right of any nonresident of Kansas class member has yet been affected; and no right could be affected unless the Kansas court renders an adverse judgment to the plaintiff class.

Accordingly, both because there is no present deprivation of any right of a plaintiff class member and also because Phillips lacks standing to argue the due process rights of its adversaries, this court should decline to review the constitutional question presented.

Phillips does business in Kansas and has been duly served with process in Kansas. No question is asserted as to the jurisdiction of the trial court or the Supreme Court over Phillips or the trial court's power to enforce a judgment against Phillips.

II. The Kansas Court's Decision to Include Non-Residents As Members of a Plaintiff Class Is Consistent With Established Law.

A. The Class Action Is a Recognized Exception to the Rule That a Court Cannot Bind Parties Not Personally Present.

Phillips argues that the nonresident plaintiffs this case have not taken any affirmative action to subn em-selves to the jurisdiction of the Kansas court.

This argument is contrary to the whole theory of F.R. Civ. P. 23 and K.S.A. 60-223, the Kansas statute which has been copied after the federal rule. Provisions in both the federal rule and the Kansas statute are practically the same pertaining to members electing to exclude themselves after proper notice. Phillips apparently is arguing that the "opt out" procedure as compared to the former "opt in" procedure is not proper.

The Kansas court in *Shutts I* (page 544) referred to the Federal Rules of Civil Procedure as amended in 1966 and pointed out that such rules allow judgment to bind all class members unless a member affirmatively "opted out" of the litigation at its commencement. The same is true of the Kansas rules.

The propriety of binding absent class members outside the jurisdiction of the forum court was decided long ago. In *Hansberry v. Lee*, 311 U.S. 32, this court found:

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by judgment in personam in a litigation in which he is not designated as a party. . .
>
> "To these general rules there is a recognized exception that, to an extent not precisely defined by judicial

> opinion, the judgment in a 'class' or 'representative' suit, . . . may bind members of the class or those represented who were not made parties to it. . .
>
> "Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all *because some are not within the jurisdiction* or because their whereabouts is unknown . . ." 311 U.S. at 40-42. (Emphasis supplied.)

To bind absent class members, the due process protections of notice and representation must be afforded. The clearest statement of those requirements is in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). To be bound by a final judgment in a representation suit, one must be "informed that the matter is pending and (have the opportunity) to choose for himself whether to appear or default, acquiesce or contest." (339 U.S. at 314, 70 S. Ct. at 657.) The kind of notice mandated in *Mullane* is exactly the kind of notice plaintiff class members have received in this case. The class members' contacts with the forum are as irrelevant here as were beneficiaries' contacts with the State of New York in *Mullane*.

Adequate notice has been provided in this case and Phillips challenges neither the method of notice nor the form or quality of representation.

Professor Moore in his treatise, *3D Moore's Federal Practice*, §23.11(5) in discussing Federal Rules of Civil Procedure 23 indicates:

> "The fact that members of the class are beyond the territorial limits of the class suit court is immaterial as to the binding effect of the class suit judgment."

The Restatements are also in agreement. The Restatement of Judgments states:

> "Section 26: Representative or Class Actions.
>
> "Where a class action is properly brought by or against members of a class the court has jurisdiction by its judgment to make a determination of issues involved in the action which will be binding as res judicata upon other members of the class, although such members are not personally subject to the jurisdiction of the court."

See also, note, "Consumer Class Action of a Multistate Class: A Problem of Jurisdiction," 25 Hastings L. J. 1411, 1432, 1435 (1974); and 30A C.J.S., *Equity*, §1456(4) at 124.

This court has implicitly concluded class actions with a multi-state class can and should be brought in state courts. In *Snyder v. Harris*, 394 U.S. 332, this court noted class actions premised on *diversity* of citizenship can "most appropriately be tried in state court" (Id. at 341) and plaintiffs "had nothing to fear from trying the lawsuit in the courts of their own state." (Id. at 340.) This led the court in *Shutts I* to question at page 545: "If the state courts cannot maintain class action suits with nonresident plaintiffs, can the 'small man' find legal redress in our modern society?"

In the Hastings Law Journal article, *supra*, it is said at page 1435:

> "It is . . . the suggestion of this note that by adhering to the same jurisdictional standards of due process required on the federal level, state courts can exercise jurisdiction over a class action regardless of the citizenship of the class members."

B. The Minimum Contacts Test Is Inapplicable to Plaintiff Class Actions.

The "minimum contacts" standards sought to be applied by Phillips to the members of a plaintiff class was developed to assure that the maintenance of a lawsuit "does not offend 'traditional notions of fair play and substantial justice.'" (*International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).) Thus, "minimum contacts" are required to protect the defendant "against the burdens of litigating in a distant or inconvenient forum." (*World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980).) As the Kansas Supreme Court has ruled in *Shutts I*, this consideration is inapplicable to class actions.

In contrast to an individual defendant, who must choose between incurring considerable expense and inconvenience if he appears in the distant forum, or judgment by default if he stays away, an adequately represented class member need not travel to the distant forum in order to insure that his claim is effectively prosecuted. Because absent class members are not formal parties to the litigation, they are not subject to certain ancillary risks such as liability for costs and attorneys' fees in the event of a judgment adverse to the class.

Class members in this case have had the opportunity to opt out and many of them have "opted out".

Judge Morris E. Frankel said:

> "If all the pertinent criteria are fairly satisfied, I believe we'll discover that the preliminary shock of 'binding' absent people will subside or disappear and that the intended functioning of the (class action) rule . . . actually promotes essential fairness and justice no less than the secondary goal of judicial efficiency." (43 F. R. D. 45, 46.)

Separate suits in each of the states where class members reside would be an extraordinarily inefficient, expensive and burdensome method of proving the liability. Phillips is merely attempting to eliminate or diminish its liability through a subterfuge.

The extension of the standard applied to defendants of "minimum contacts" to plaintiff class members or, for that matter, any requirement of contacts with the forum other than the sharing of common interests with an adequate representative who is properly before the forum, is both unprecedented by any decision of this court and contrary to *Hansberry v. Lee, supra.* By their very nature, class actions must proceed in the absence of most class members. (*Schlosser v. Allis Chalmers Corp.*, 86 Wis. 2d 226, 241-242, 271 N. W. 2d 879, 886-887 (1978).) This principle was well established by this court more than 100 years ago in *Smith, et al. v. Swormstedt, et al.*, 57 U.S. (16 How.) 288, 301-303 (1853). If the class member is absent, it makes no difference whether he is absent within or outside the forum state—but rather whether his interests have been adequately represented.

Phillips places unfounded reliance on *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); and *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) and similar cases. Not one of those cases, all of which concerned jurisdiction over nonresident *defendants*, in any way diminishes the "recognized exception" to the requirement of in personam jurisdiction in plaintiff class actions.

C. Comparison With Gillette Case.

Phillips argues that this case is comparable with *Gillette Company v. Miner*, No. 81-1493, 102 S. Ct. 1767 (1982) in this court. *Shutts II* in some respects is similar. It involves nonresident plaintiff class members and therefore has similar issues.

However, *Gillette* involves a promotional scheme wherein it offered a $7.95 prize for purchasing certain items, where *Shutts II* involves substantial interest which is due to plaintiff royalty owners for use by Phillips of their money. In *Gillette*, the Petition is from a ruling of the Illinois Supreme Court reversing the Circuit Court of Appeals and the trial court in denying certification of nonresident members of plaintiff class, while in *Shutts II* the class has been certified by the trial court to include nonresident members, the ruling has been upheld by the Supreme Court in its denial of mandamus to the trial court, and Phillips now is attempting to overturn both the ruling of the trial court and the Supreme Court of Kansas.

In addition, the Kansas court in *Shutts I* considered the common fund cases and held them to be analogous to this case. (See *Hartford Life Ins. Co. v. Ibs* and similar cases cited previously in this brief at pages 6-7.)

The Kansas court in *Shutts I*, pages 552-553, said:

> "The 'common fund' cases, which seem to be universally accepted, are closely analogous to the case at bar. Here Phillips filed a corporate undertaking guaranteeing to refund any or all portions of 'FPC suspense money' with interest which it collected and held pending FPC determination of the lawful gas rates in the Hugoton-Anadarko area rate proceedings...

"Had Phillips put the 'suspense royalty' into a common trust fund, separate from its operating funds, to be used solely to pay either the pipeline companies or the gas royalty owners once the FPC ultimately decided the rate increase question, this case would dovetail nicely into the 'common fund' cases. Instead Phillips commingled the 'suspense royalty' to fulfill its business obligation. In this matter the 'suspense royalty' which never did or could belong to Phillips, enriched Phillips at the expense of the royalty owners. To hold that Phillips' act of using the money for business purposes and not putting it into a separate corporate account, takes this case out of the 'common fund' category would reward Phillips' action at the expense of innocent gas royalty owners." Citing *Perlman v. First National Bank of Chicago,* 15 Ill. App. 3d 784, 305 N. E. 2d 236 which held:

". . . There seems no basis in law or logic for permitting a class action against an individual who has sequestered all money wrongfully acquired but denying one against an individual who has commingled it with his other assets."

Phillips concedes that the "common fund" cases are correct holdings, but attempts to distinguish the facts. Actually, the facts cannot be successfully distinguished and it is anticipated that the Kansas court will correctly order a common interest fund to be paid over to Phillips royalty owners in *Shutts II* just as it did in *Shutts I.*

Although the Kansas resident royalty owners under Phillips' leases may be comparatively small in number, Kansas with its Hugoton Gas Field and other gas producing areas, has substantial interest in royalty owners receiving interest on suspense royalties, and the common fund

analogy applies. (See plaintiffs' Motion to Dismiss Petition for Writ of Mandamus in the Kansas Supreme Court, hereto attached at Appendix pages A21 to A26.)

III. Answers to Phillips' Other Claims

Phillips argues that state court opinions are in conflict on the question of jurisdiction over plaintiff classes because there is one Pennsylvania case and one New Jersey case opposed to the *Shutts I* opinion. There is no contradiction of the holding of these state courts as to the law. Both the Pennsylvania and New Jersey cases were discussed in *Shutts I*, pages 549 to 551, and held inapplicable for reasons there stated.

It is apparent that the Pennsylvania statutory language in *Klemow v. Time, Inc.*, 466 Pa. 189, 352 A.2d 12, cert. denied, 429 U.S. 828, is completely at variance with the Kansas statutory language. The Pennsylvania statute as to a class action prohibits a judgment from imposing personal liability on anyone not a party thereto.

As to the New Jersey case of *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 362 A.2d 1177, the Kansas Supreme Court in *Shutts I* disposed of *Feldman* as follows:

> "An excellent example of a factual situation in which a trial judge applying our class action statute should deny certification of a class action, where nonresident plaintiff class members are involved, is presented in *Feldman v. Bates Mfg. Co., supra.*" (*Shutts I*, page 557.)

Phillips apparently ignores the fact that Shutts has royalties both in Texas and Oklahoma, the largest states in properties and residences of parties involved, and Andersons also have royalties in Oklahoma.

Phillips claims it "could not have reasonably anticipated being haled into the Kansas courts to defend claims of nonresidents arising from leases located in other states." *Shutts I*, a case in which Phillips paid interest on FPC suspense royalties after certiorari was denied adequately disposes of that contention. After that decision Phillips should have voluntarily paid all of its royalty owners interest on monies suspended. By flagrantly violating a state Supreme Court order, Phillips should have had every reasonable expectation the courts of that state would not countenance such action.

Phillips has adopted a theory of "divide and conquer" in trying this lawsuit. In order to decrease liability, Phillips would like to limit the lawsuit either to the named plaintiffs only, or to the named plaintiffs and their colessors. Failing that, Phillips would like to limit it to the so-called "designated area" of two counties in Oklahoma and two counties in Texas where named plaintiffs have their royalties. Failing that, they would like to limit it to residents of Kansas only. The Kansas trial court and Supreme Court have correctly included all of Phillips gas royalty owners and overriding royalty owners to whom they accounted.

It has not yet been determined in *Shutts II* that Phillips owes interest, but the subject is adequately covered in *Shutts I*, where it was found and held that:

> "What is significant is these gas royalties suspense monies never did or could belong to Phillips." (*Shutts I*, page 560.)
>
> "Phillips made substantial profit during the years 1961-1973. The net profit ranged from $113,000,000.00 to $132,000,000.00 during the period in question and stock-

holders' equity increased from $1,205,000,000.00 in 1962 to over $1,749,000,000.00 in 1971." (*Shutts I*, page 560.)

". . . We do not believe that Phillips may enrich itself in the absence of any contractual sanction or seize upon the procedural complexities of the FPC to avoid responsibility for an appropriate measure of damages, expressed in terms of interest." (*Shutts I*, page 561.)

"We are dealing with 'suspense royalty' which never could or would belong to Phillips. This was the equivalent of a common fund which was accumulated and used by Phillips. . . Phillips was a stakeholder who retained the fund which it used for its own benefit. . . If the FPC had denied all of Phillips' rate increase applications, Phillips would have had to pay 7% and later 8% interest to the gas purchasers pursuant to its express agreement and corporate undertaking with the FPC. Thus, Phillips has made an express agreement, with regard to the monies accumulated in the suspense fund by Phillips, to pay 7% and later 8% interest, as ultimately determined by the FPC Opinion No. 586." (*Shutts I*, page 564.)

The anticipated award of interest involves no federal question and will be eminently fair and just.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Date: October 15, 1982

APPENDIX

No. .....

IN THE DISTRICT COURT OF SEWARD COUNTY, KANSAS

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually, and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinions Nos. 699, 699H, 749, 749C, 770 and 770A,
Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

(Civil Class Action under K.S.A. Chapter 60)

PETITION

COME NOW the plaintiffs and allege and show to the court:

1) Plaintiff Irl Shutts is a resident of Barber County, Kansas, and his post office address is Sun City, Kansas. Plaintiffs Robert Anderson and Betty Anderson are residents of Texas County, Oklahoma, and their post office address is Box 1113, Guymon, Oklahoma 73942. Defendant is a corporation doing business in Seward County, Kansas. Defendant is referred to as Phillips in this Petition and such designation is intended to include the defendant corporation and any predecessor corporations in making gas payments hereinafter mentioned.

2) Plaintiffs are Phillips' royalty owners and are members of a class composed of all producers and royalty owners to whom Phillips made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinions Nos. 699, 699H, 749, 749C, 770 and 770A and the class may be divided into subclasses as follows:

(A.) A subclass consisting of producers and royalty owners who received payment from Phillips on or about December, 1975, of gas price increases pursuant to FPC Opinions 699 and 699H theretofore "suspended" by Phillips. (See Exhibit "1" hereto attached and made a part hereof.)

(B.) A subclass consisting of producers and royalty owners who received payments from Phillips on or about September, 1977, and March, 1978, of gas price increases pursuant to FPC Opinions Nos. 770 and 770A theretofore "suspended" by Phillips. (See Exhibits "2" and "3" hereto attached and made a part hereof.)

(C.) A subclass consisting of producers and royalty owners who received payment from Phillips in about September, 1978, of gas price increases pursuant to FPC Opinions Nos. 749 and 749C theretofore "suspended" by Phillips. (See Exhibits "4", "5" and "6" hereto attached and made a part hereof.)

3) Plaintiffs bring this action individually and as representatives of all of that class of producers and royalty owners referred to in Paragraph 2 above. Plaintiffs are informed and believe that the class which they seek to represent is composed of over 10,000 members, whose names and addresses are known to Phillips, but not to plaintiffs, and their number makes it impracticable to join all of them in this action. Plaintiffs are informed and believe that formerly Phillips paid the plaintiffs and other

class members all of their proportionate share of the proceeds of gas produced and sold; that beginning several years ago, and just when plaintiffs do not know, Phillips began receiving higher prices for the gas sold, but continued paying the class members at the old price. Plaintiffs are informed that Phillips commingled such so-called "suspended" money with its own money and invested and used the same for its own purposes. Phillips has not paid the plaintiff class or subclasses or anyone else for the use of such "suspended" monies held by Phillips during these periods of time. The Federal Power Commission issued its Opinion No. 699 on June 21, 1974, No. 699H on December 4, 1974, No. 749 on December 2, 1975, No. 749C on July 19, 1976, No. 770 on July 27, 1976, and No. 770A on November 5, 1976, which approved price escalations in rates for gas paid to Phillips but Phillips did not pay out to the class members until dates as above stated in Paragraph 2, the last date being September, 1978. The total amount of class members' money so held and finally paid over to the class members is not known to plaintiffs, but is known to defendant and is estimated by plaintiffs to be over $1,000,000.00.

4) The plaintiffs and other members of the class are entitled to recover from Phillips for its use of the money on any one or more of the following theories or for the following reasons:

(A.) The doctrine of unjust enrichment. (*Shutts v. Phillips Petroleum Company*, 222 Kan. 527, 567 P.2d 1292, Syl. 19; U. S. Cert. denied 434 U. S. 1068, rehearing denied 435 U. S. 961.)

(B.) The equitable principle that when one makes actual use of money belonging to another, it is required to pay interest on the money so retained and used. (*Shutts*, supra, Syl. 20.)

(C.) Equitable principles require that class members receive the same treatment as gas purchasers as to interest required by the Federal Power Commission on "FPC suspense monies". (*Shutts*, supra, Syl. 21.)

(D.) Phillips made an *express* agreement by filing corporate undertaking with the Federal Power Commission to pay interest on the "suspended" proceeds. (*Shutts*, supra, P. 564.)

5) The question of law and fact involved in this action is common to all members of the class and subclasses identified above and is as follows:

"Should Phillips pay interest to class members on such 'suspended' monies at the rate of 7% per annum to October 10, 1974, and at the rate of 9% per annum thereafter until paid over to class members, all in accordance with FPC Order No. 513-A, issued July 14, 1976?"

6) The claim of these plaintiffs is typical of all claims of the general class identified above and of all three subclasses and plaintiffs can and will fairly and adequately protect the interests of such class and subclasses and all members of the class and the subclasses.

7) Prosecution of separate actions by individual members of the class and subclasses identified above would result in multiple lawsuits; would create a risk of inconsistent or varying adjudications concerning individual members of the class and subclasses and could establish incompatible standards of conduct for defendant.

8) The amount of interest due these plaintiffs from defendant is probably less than $1,000.00 each and it is believed and so alleged by the plaintiffs that many of the

members of the class and subclasses identified above have small amounts at stake. As a practical matter, many members of the class and subclasses would have no remedy if this action could not proceed as a class action.

9) Phillips has systematically and purposely withheld the money due the plaintiffs and other members of the class and subclasses and has used the money for its own purposes. Such action by Phillips without compensation to the class members for the use of the money has affected all members of the class in exactly the same way, except as to the amount due each, which can be easily computed through Phillips' records and computers. A class action is the only suitable means of redress to the plaintiffs and other class members.

10) The essential question at issue is the matter of collection of interest on money used by Phillips for several years and there is a community of interest among all members of the class and subclasses in this question and in the remedy. There is a "common fund" set up as to each of the subclasses subject to recovery in this action. The members of the class and subclasses are made up of residents and nonresidents of the State of Kansas, the above FPC opinions being nationwide gas pricing regulations. Class members are those affected by the national rates as set up by the FPC opinions above mentioned as distinguished from rates previously set up by FPC which affected only the individual rate making areas as defined by FPC, such as the Hugoton-Anadarko area.

WHEREFORE, plaintiff prays for an order of the court finding that this action is maintainable as a class action; for judgment in favor of plaintiff and other members of the

class for interest, costs of this action, attorneys' fees and expenses, and for all other proper relief.

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By /s/ W. Luke Chapin
Attorneys for Plaintiffs

Exhibit "1"

PHILLIPS PETROLEUM COMPANY

NOTICE CONCERNING PAYMENTS UNDER FEDERAL POWER COMMISSION OPINION NO. 699

On October 14, 1975, the United States Court of Appeals for the Fifth Circuit issued its opinion in *Shell, et al. v. FPC* (No. 74-3330, et al.), affirming the Commission's Opinion Nos. 699 and 699-H. As you were advised by an earlier notice, this case involved challenges to a number of aspects of Opinion Nos. 699 and 699-H issued by the Federal Power Commission on June 21, 1974 and December 4, 1974, respectively. In its opinions the Commission established a nationwide just and reasonable rate for sales in interstate commerce of gas developed or contracted after January 1, 1973.

Our prior notice advised that because of the judicial challenges to the validity of those rates, Phillips would con-

sider as firm proceeds only 35¢ of the nationwide new gas rate with the balance being held pending judicial review unless a satisfactory indemnity was executed.

Although the action of the Fifth Circuit in affirming Opinion Nos. 699 and 699-H is subject to further review by the United States Supreme Court, Phillips has determined that it will make payment on the basis of the full amount collected under those opinions for natural gas covered hereby. Such increased payments are made upon the express condition and understanding that in the event the Supreme Court reverses or modifies the opinion of the Fifth Circuit in such a manner as to disallow all or a portion of the collections made under Opinion Nos. 699 and 699-H, recipients of such increases will make prompt refund to Phillips of all disallowed portions. If refund thereof is not made within thirty (30) days from the date of Phillips' notice advising that refund is due, then Phillips shall recoup the amount of such refund from future payments.

Any party who does not desire to receive such increased amounts under the above conditions should return the payment enclosed herewith with written advice that payment of such sums covered by Opinion No. 699 and 699-H is not desired.

PHILLIPS PETROLEUM COMPANY
EXPLORATION & PRODUCTION
SETTLEMENTS DIVISION—628 FPB
BARTLESVILLE, OKLAHOMA 74004

December 1975

Exhibit "2"

PHILLIPS PETROLEUM COMPANY

NOTICE CONCERNING FEDERAL POWER COMMISSION OPINIONS NO. 770 AND 770A COVERING INTERSTATE SALES OF GAS FROM WELLS COMMENCED AFTER JANUARY 1, 1973

On August 17, 1977, the United States Court of Appeals for the District of Columbia Circuit denied petitions for rehearing of its opinion issued on June 16, 1977, in *The Second National Natural Gas Rate Case* (*American Public Gas Association, et al. v. FPC,* No. 76-2000, et al.) affirming the Commission's Opinions No. 770 and 770A. As you were advised by an earlier notice, this case involved a number of challenges to a number of aspects of the Commission's opinion prescribing nationwide just and reasonable rates for sales in interstate commerce of gas from wells commenced after January 1, 1973.

Our prior notice advised that because of judicial challenges to the validity of those rates, Phillips would suspend payment of amounts collected under Opinions 770 and 770A which exceed the "new gas" rate in effect prior to Opinions 770 and 770A pending judicial review unless a satisfactory indemnity was executed.

Although the action of the D. C. Circuit in affirming Opinions 770 and 770A is subject to further review by the United States Supreme Court, Phillips has determined that it will commence payment on the basis of the full amount collected under those opinions for natural gas covered thereby. Such increased payments are made upon the express condition and understanding that in the event the Supreme Court reverses or modifies the opinion of the

D. C. Circuit in such a manner as to disallow all or a portion of the collections made under Opinions No. 770 and 770A, recipients of such increases will make prompt refund to Phillips of all disallowed portions. If refund thereof is not made within thirty days from the date of Phillips' notice advising that refund is due, then Phillips shall recoup the amount of such refund from future payments.

Any party who does not desire to receive such increased amounts under the above conditions should forthwith so advise Phillips. In the absence of such advice Phillips will presume acceptance of the above procedure and will commence payments accordingly.

SEPTEMBER 1977

PHILLIPS PETROLEUM COMPANY
EXPLORATION & PRODUCTION
SETTLEMENTS SECTION, 642 FPB
BARTLESVILLE, OKLAHOMA 74004

Exhibit "3"

PHILLIPS PETROLEUM COMPANY
NOTICE CONCERNING FEDERAL POWER
COMMISSION OPINIONS NO. 770 AND 770A
COVERING INTERSTATE SALES OF GAS FROM
WELLS COMMENCED AFTER JANUARY 1, 1973

You were advised by notice dated September 1977, of the action of the United States Court of Appeals for the District of Columbia Circuit affirming Federal Power Commission Opinions 770 and 770A which prescribed nationwide just and reasonable rates for sales in interstate commerce of natural gas from wells commenced after Jan-

uary 1, 1973. On March 6, 1978 the United States Supreme Court declined to review the opinion of the D. C. Circuit.

The enclosed check represents payments on the basis of the full amount collected under those opinions for natural gas covered thereby.

PHILLIPS PETROLEUM COMPANY
EXPLORATION & PRODUCTION
SETTLEMENTS SECTION, 642 FPB
BARTLESVILLE, OKLAHOMA 74004

March, 1978

Exhibit "4"

NOTICE CONCERNING FEDERAL POWER COMMISSION OPINIONS NO. 749 and 749C COVERING INTERSTATE SALES OF GAS FROM WELLS COMMENCED PRIOR TO JANUARY 1, 1973, UNDER CONTRACTS EXECUTED PRIOR TO JANUARY 1, 1973

The following notice is directed to all producers who sell gas to Phillips Petroleum Company under percent of proceeds type contracts executed prior to January 1, 1973, from wells commenced prior to January 1, 1973, and to all royalty owners to whom payments are made for gas produced from wells commenced prior to January 1, 1973, and sold under contracts executed prior to January 1, 1973.

In our notice of April 1976, we advised that in Opinion No. 749 the Federal Power Commission established a single nationwide rate applicable to gas sold in interstate commerce from wells commenced prior to January 1, 1973, under contracts executed prior to January 1, 1973. This

new rate is applicable to Phillips' sales of such gas for resale in interstate commerce. Opinion No. 749 prescribed a rate to be applicable for the period from January 1, 1976 to July 1, 1976 and an increase therefrom to be applicable on and after July 1, 1976.

On July 19, 1976, the Federal Power Commission issued Opinion No. 749C denying rehearing. A petition for review of Opinion No. 749C has been filed in the United States Court of Appeals for the Fifth Circuit.

Although the Commission's action is under judicial review and therefore not final, Phillips has determined that it will make payment for the period between January 1, 1976 and July 1, 1976, on the basis of the full amount collected under Opinion No. 749 for that period. Payment subsequent to July 1, 1976 will be made on this same basis and that portion of its settlement payments attributable to the increase prescribed by Opinion No. 749 for the period subsequent to July 1, 1976, will be suspended pending final action by the Federal Power Commission and judicial determination of the applicable rates.

The payments being made under Opinion No. 749 are made upon the express condition and understanding that in the event the Federal Appeals Court reverses or modifies Opinion No. 749 in such a manner as to disallow all or a portion of the collections made thereunder, recipients of such increases will make prompt refund to Phillips of all disallowed portions. If refund thereof is not made within 30 days from the date of Phillips' notice advising that refund is due, then Phillips shall recoup the amount of such refund from future payments. With respect to that portion of the Opinion No. 749 rates applicable to the period subsequent to July 1, 1976, payment of which Phillips will suspend, producers and royalty owners desir-

ing to receive payments computed currently on the full sums being collected by Phillips may arrange to do so by furnishing Phillips acceptable indemnity to cover their proportionate part of any refunds which ultimately may be required, together with any applicable interest charges.

September 1976

PHILLIPS PETROLEUM COMPANY
EXPLORATION & PRODUCTION
SETTLEMENTS DIVISION--628 FPB
BARTLESVILLE, OKLAHOMA 74004

Exhibit "5"

NOTICE CONCERNING FEDERAL POWER COMMISSION OPINIONS NO. 749 AND 749C COVERING INTERSTATE SALES OF GAS FROM WELLS COMMENCED PRIOR TO JANUARY 1, 1973, UNDER CONTRACTS EXECUTED PRIOR TO JANUARY 1, 1973

The following notice is directed to all producers who sell gas to Phillips Petroleum Company under percent of proceeds type contracts executed prior to January 1, 1973, from wells commenced prior to January 1, 1973, and to all royalty owners to whom payments are made for gas produced from wells commenced prior to January 1, 1973, and sold under contracts executed prior to January 1, 1973.

As you are aware from our notice of September, 1976, the Federal Power Commission's Opinions No. 749 and 749C which prescribed rates for such natural gas was appealed to the United States Court of Appeals for the 5th Circuit. As a result of the pendency of that appeal, Phillips suspended that portion of its settlement payments

attributable to the increase prescribed by Opinion No. 749 for the period subsequent to July 1, 1976, and offered to make payment thereof only upon receipt of an acceptable indemnity.

In view of the action of the United States Supreme Court on March 6, 1978, denying a petition for writ of certiorari for review of the D. C. Circuit Court opinion affirming the Commission's Opinions No. 770 and 770A prescribing nationwide rates for gas from wells commenced *after* January 1, 1973, Phillips has determined that it will commence payment on the basis of the full amount collected under Opinions No. 749 and 749C for natural gas covered thereby. Since review of Opinions No. 749 and 749C is still pending, such increased payments are made upon the express condition and understanding that in the event the Court reverses or modifies the opinion of the Commission in such a manner as to disallow all or a portion of the collections made under Opinions No. 749 and 749C, recipients of such increases will make prompt refund to Phillips of all disallowed portions. If refund thereof is not made within thirty days from date of Phillips' notice advising that refund is due, then Phillips shall recoup the amount of such refund from future payments.

Any party who does not desire to receive such increased amounts under the above conditions should forthwith so advise Phillips. In the absence of such advice Phillips will presume acceptance of the above procedure and will commence payments accordingly.

March, 1978

PHILLIPS PETROLEUM COMPANY
EXPLORATION & PRODUCTION
SETTLEMENTS SECTION 642 FPB
BARTLESVILLE, OKLAHOMA 74004

Exhibit "6"

NOTICE CONCERNING FEDERAL POWER COMMISSION OPINIONS NO. 749 AND 749C COVERING INTERSTATE SALES OF GAS FROM WELLS COMMENCED PRIOR TO JANUARY 1, 1973, UNDER CONTRACTS EXECUTED PRIOR TO JANUARY 1, 1973

The following notice is directed to all producers who sell gas to Phillips Petroleum Company under percent of proceeds type contracts executed prior to January 1, 1973, from wells commenced prior to January 1, 1973, and to all royalty owners to whom payments are made for gas produced from wells commenced prior to January 1, 1973, and sold under contracts executed prior to January 1, 1973.

As you are aware from our notice of September, 1976, the Federal Power Commission's Opinions No. 749 and 749C which prescribed rates for such natural gas was appealed to the United States Court of Appeals for the 5th Circuit. As a result of the pendency of that appeal, Phillips suspended that portion of its settlement payments attributable to the increase prescribed by Opinion No. 749 for the period subsequent to July 1, 1976, and offered to make payment thereof only upon receipt of an acceptable indemnity.

On April 18, 1978 the 5th Circuit issued its decision affirming the action of the Commission in issuing Opinion No. 749 and 749C. A Conditional Petition for Writ of Certiorari was filed with the United States Supreme Court; however, on August 8, 1978, that Petition was voluntarily dismissed.

The rates prescribed by Opinion No. 749 and 749C having thus become final and no longer subject to judicial review, Phillips has commenced payment on the basis of the full amount collected thereunder for natural gas covered there-

by. The check enclosed herewith represents payment on this basis.

September, 1978

PHILLIPS PETROLEUM COMPANY
EXPLORATION & PRODUCTION
SETTLEMENTS SECTION, 642 FPB
BARTLESVILLE, OKLAHOMA 74004

No. 79C113

IN THE
DISTRICT COURT OF SEWARD COUNTY, KANSAS

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually, and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinions Nos. 699, 699H, 749, 749C, 770 and 770A,
Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

PLAINTIFFS' MOTION TO CERTIFY AS A CLASS ACTION

COME NOW the above named plaintiffs and move the court to certify the above entitled action as a class action wherein plaintiffs represent all that class of producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinions Nos. 699,

699H, 749, 749C, 770 and 770A. In support of this motion, plaintiffs make a part hereof the pleadings, defendant's answers to plaintiffs' interrogatories and defendant's answers to plaintiffs' requests for admissions; and further state as follows:

1) The proposed class consists of the following subclasses:

a. A subclass consisting of producers and royalty owners who received payment from Phillips of suspended monies pursuant to FPC Opinions 699 and 699H, 23,858 checks having gone out to them.

b. A subclass consisting of producers and royalty owners who received payments from Phillips pursuant to Opinions Nos. 749 and 749C theretofore suspended by Phillips, total number of checks going out to producers and royalty owners being approximately 23,500 checks.

c. A subclass consisting of producers and royalty owners who received payment from Phillips pursuant to FPC Opinions No. 770 and 770A theretofore suspended by Phillips, there having been more than 16,157 checks gone out to such producers and royalty owners.

2) Phillips admits receiving money at increased rates which was subject to being refunded to gas purchasers, with interest, to the extent the Federal Power Commission did not approve such increased rates and admits receiving FPC suspense monies not currently paid to its royalty owners and producers but eventually paid to its royalty owners and producers; Phillips admits that it did not at any time pay any interest on such money that was eventually paid over to gas royalty owners and producers to whom it accounted. Phillips further admits that

the total monies paid over to its producers and royalty owners under the various subclasses was as follows:

a. Under 699 and 699H, total payment of approximately $13,868,500.00.

b. Under Opinions Nos. 749 and 749C, total payments of approximately $4,554,700.00.

c. Under Opinions 770 and 770A, total payments of approximately $18,501,200.00.

3) Phillips further admits that the period of suspension of such royalties and suspended income as to each of the opinions is as follows:

a. As to Opinions Nos. 699 and 699H:

Suspended July, 1974, through September, 1975;

Payments made December, 1975, and January, February, March, May, July and December, 1976.

b. As to Opinions Nos. 749 and 749C:

Suspended January, 1976, through February, 1978;

Payments made in September and November, 1976; and in September, October and December, 1978; and in March, 1979.

c. As to Opinions Nos. 770 and 770A:

Suspended August, 1976, through July, 1977;

Payments made March and December, 1978, and in March, 1979.

Therefore, the only questions of law and fact are common to the entire class of gas royalty owners and producers to whom such payments were made on a nationwide basis, pursuant to the above mentioned FPC Opinions, all of

which were nationwide in their effect; and those questions are as follows:

a. Does Phillips owe interest on such monies held and used by Phillips and at what rate of interest?

Or

b. Does Phillips owe damages in the form of a share of its profits for the use of such money and if so, in what amount or at what rate of interest?

4) The claims of plaintiffs Shutts and Anderson for interest as disclosed by their Petition are typical of the claims of all members of the class of producers and gas royalty owners above referred to. All other Phillips gas royalty owners and producers have similar claims for interest, the only difference being in the amount of royalties or suspense monies to which the same apply and the time for which the interest should be computed. In other words, the only difference is in mathematical or arithmetical computations.

5) Plaintiffs are adequately represented by counsel who can and will represent the entire class, such counsel being the firm of Ginder & Moore, Cherokee, Oklahoma, and Chapin, Penny & Goering, Medicine Lodge, Kansas, and further qualifications will be furnished if requested by defendant or the court.

6) The foregoing constitute the prerequisites of Subdivision (a) of K.S.A. Supp. 60-223.

7) In addition:

a. The prosecution of separate actions by Phillips' gas royalty owners and producers to whom they account would create a risk of "(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible stan-

dards of conduct for the parties opposing the class (Phillips), or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. . ." (K.S.A. Supp. 60-223(b)(1)); and

b. "The party opposing the class (Phillips) has acted or refused to act on grounds generally applicable to the class (failing and refusing to pay interest of any nature on such suspended monies which were paid over to gas royalty owners and producers pursuant to the above opinions), thereby making appropriate . . . declaratory relief with respect to the class as a whole. . ." (K.S.A. 60-223(b)(2), and, in addition or in the alternative,

c. ". . . the question of law or fact common to the members of the class predominate over any questions affecting only individual members, unless it be that of individual arithmetical computations, which as shown by the records is available through Phillips' records, and that a class action is superior to other available means for the fair and efficient adjudication of the controversy." (K.S.A. Supp. 60-223(b)(3).

8) The amount of interest due these plaintiffs from defendant is comparatively small and is alleged and believed to be less than $1,000.00 to each of them and it is further alleged that the average amount due each gas royalty owner or producer of the proposed class is comparatively small and, as a practical matter, most members of the class would have no adequate remedy, due to the size of their claims, if this action did not proceed as a class action.

9) Plaintiff is willing to advance such publication and mailing costs as may be required, but shows to the court that defendant has names and addresses of its royalty owners and producers readily available in its records and that defendant should bear the cost of addressing and mailing notices to its royalty owners that can be inserted along with the mailing of regular royalty checks. Copy of suggested notice is attached.

WHEREFORE, plaintiff prays that upon hearing of this motion the court determine that this is a proper class action involving all of defendant's gas royalty owners and producers to whom defendant accounts affected by FPC Opinions Nos. 699 and 699H, 749 and 749C, and 770 and 770A.

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Chapin, Penny & Goering
Attorneys at Law
Chapin Building
Medicine Lodge, Kansas 67104
By /s/ W. Luke Chapin
W. Luke Chapin
Attorneys for Plaintiffs

NOTICE OF HEARING

TO DEFENDANT PHILLIPS PETROLEUM COMPANY AND ITS ATTORNEYS OF RECORD:

TAKE NOTICE that the foregoing Motion will be heard by the District Court of Seward County, Kansas, at the District Courtroom, Liberal, Kansas, on the ..... day of ....., 1980, at ..... o'clock a.m.

/s/ W. Luke Chapin
W. Luke Chapin

No. 82-54608-S

IN THE
SUPREME COURT OF THE STATE OF KANSAS

PHILLIPS PETROLEUM COMPANY,
Plaintiff,

vs.

KEATON G. DUCKWORTH, District Judge, 26th Judicial District, IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually and as representatives of all royalty owners and overriding royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,
Respondents.

MOTION TO DISMISS PETITION FOR WRIT OF MANDAMUS

COME NOW the above named respondents and move the court for an order quashing and dismissing the Petition for a Writ of Mandamus filed herein for the following reasons:

1) The pleadings show that the order of the District Court complained of is an order determining that the case of Shutts, et al. v. Phillips Petroleum Company, Seward County No. 79-C-113, is a class action pursuant to K.S.A. Supp. 60-223; and such class order is *not* a final order as the statute provides it "may be altered or amended as may be desirable from time to time." (K.S.A. Supp. 60-223(d)(4).)

2) This case is the "second verse" of the "same song". *Shutts I*, 222 K. 527, 567 P.2d 1291, cert. den. 434 U. S. 1068, is an exhaustive opinion on the jurisdiction of Kansas courts over nonresident members of a plaintiff class, particularly in a case such as this where a common fund is involved. This case poses exactly the same jurisdictional questions as *Shutts I*, excepting that beginning with FPC Opinion 699, the commission began rate making nation wide, rather than by area (such as the Hugoton-Anadarko area in *Shutts I*). Therefore, this case, *Shutts II*, involves Phillips royalty owners under leases in the eleven states where the company does business rather than Kansas, Oklahoma and Texas only, as in *Shutts I*. (See *Newberg, Class Actions, Suppl.*, §1206.)

3) Since the order complained of is not a final order, it would not ordinarily be subject to interlocutory appeal, as it would not "materially advance the ultimate termination of the litigation." (Supreme Court Rule No. 4.01.)

4) Where a District Court acts judicially "Mandamus will not lie to control discretion or to revise judicial action . . . nor will mandamus lie even though the party aggrieved has no right of appeal or other remedy to review the action of the court, as the want of such remedy does not of itself entitle the party aggrieved to the extraordinary remedy of Mandamus." (*Railroad Co. v. Shinn*, 60 Kan. 111, 55 Pac. 346; see, also, William M. Ferguson, *Extraordinary Legal Remedies in Kansas*, 2 Washburn Law Review, 17-20; and *State, ex rel. v. Norton*, 20 Kan. 506.)

5) The Petition for Mandamus further shows on its face that the District Court issued the class order based upon mixed questions of law and fact, upon which the right to assume jurisdiction depends and upon which it

is the duty of the District Court to pass judicially; and even though it were assumed that the discretion of the court was erroneously exercised, it cannot under these circumstances be corrected by Mandamus. (52 Am Jur. 2d, *Mandamus,* §312; *Johnson v. Schoch,* 84 Kan. 884, 115 Pac. 638.)

6) The matter complained of by Phillips will be subject to appeal after hearing of the case on its merits. This court "cannot use its original jurisdiction in Mandamus as a substitute for its appellate jurisdiction provided by law." (*Mahoney v. Stavely,* 160 Kan. 792, 165 P.2d 230.)

7) A class order pursuant to K.S.A. Supp. 60-223 and providing for notice, such as entered by the court in this case, is a discretionary order and merely a step in the orderly progress of the case. As such, the order is not ordinarily subject to review by the extraordinary Writ of Mandamus. (Newberg, *Class Actions,* §2182 and §2500 (c).)

8) Petition for the Writ states that Phillips has been advised that counsel for Shutts, et al. do not intend to mail the class notices provided for in the class order of May 21, 1982, until this matter is finally determined. If Phillips obtained that impression from counsel for plaintiffs, it is not true at the present time. The notices, all 33,600 of them, are now being printed, to be mailed on or before June 18, 1982. Procedure for mailing notices in *Shutts II* is different than in *Shutts I,* plaintiffs being required by the court in *Shutts II* to advance the costs of printing and mailing.

9) There is substantial authority opposed to the arguments of Phillips that nonresidents of Kansas, a "nation-

wide class", cannot be included in plaintiff class in this case. The best authorities on the subject are quoted in *Shutts I.*

10) *Feldman v. Bates Mfg. Co.*, 143 N.J. super 84, 362 A.2d 1177, cited in Phillips' brief was distinguished as to the factual situation in *Shutts I* and is also distinguished by the factual situation in *Shutts II.* Phillips continues to cite cases where the concept of jurisdiction over nonresident defendants, rather than over nonresident plaintiff class members, is at issue. (See *International Shoe Co. v. Washington*, 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154, and the many cases following pertaining to nonresident defendants.) In the *Gillette* case, 87 Ill. 2d 7, 428 N.E. 2d 478, opinion attached in full to Phillips Memorandum Brief, at Page A-14, the dissenting Illinois judge distinguishes *Shutts I* from the *Gillette* case on the grounds that: (1) Kansas has jurisdiction of a large portion of the Hugoton-Anadarko area; and (2) Shutts "dovetails nicely into the 'common fund' cases." Likewise, in this case, *Shutts II*, Kansas with its Hugoton field and other gas producing areas, has substantial interest in royalty owners receiving interest on suspense royalties as in *Shutts I*; and this case is exactly like *Shutts I* insofar as the common fund analogy is concerned. (See, also, *Newberg, Suppl.* §1206b.)

11) In fact, it would seem that both the District Court of the 26th Judicial District and the Supreme Court of the State of Kansas would have substantial interest in seeing to it that Phillips adheres to the rulings of *Shutts I* pertaining to payment of interest to its royalty owners on suspense monies held and used, rather than Phillips being allowed to ignore the rulings previously made in *Shutts I.*

WHEREFORE, respondents pray that the request of Phillips for a restraining order and for a Writ of Mandamus be denied; that there be no hearing granted on the Petition for a Writ of Mandamus; and that the Petition filed herein be quashed and dismissed.

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P. O. Box 296
Liberal, KS 67901
By /s/ W. Luke Chapin
Attorneys for Respondents

AFFIDAVIT OF MAILING

STATE OF KANSAS,

COUNTY OF BARBER, SS:

W. Luke Chapin, of lawful age and being first duly sworn, on oath states:

On June 18, 1982, he mailed in the U. S. mail, postage prepaid, copies of the foregoing Motion as follows:

> Original and nine copies to Lewis Carter, Clerk of Appellate Courts, Kansas Judicial Center, Topeka, Kansas 66612;

Copy to T. L. Cubbage II, Phillips Petroleum Company, Legal Division, Bartlesville, OK 74004;

Copy to Joseph W. Kennedy, Morris, Laing, Evans, Brock & Kennedy, Suite 430, 200 West Douglas, Wichita, KS 67202;

Copy to James R. Yoxall, Light, Yoxall, Antrim & Richardson, Box 1278, Liberal, KS 67901;

Copy to Ed Moore, Ginder & Moore, 202 S. Grand, Cherokee, OK 73728;

Copy to Harold K. Greenleaf, Smith, Greenleaf & Brooks, Box 296, Liberal, KS 67901;

Keaton G. Duckworth, District Judge, Elkhart, KS 67950.

/s/ W. Luke Chapin
W. Luke Chapin

Subscribed and sworn to before me this 18th day of June, 1982.

/s/ Helen Axline
Notary Public

My appointment expires: June 24, 1983.

Office - Supreme Court, U.S.
FILED
NOV 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-461

In the Supreme Court of the United States

October Term, 1982

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

KEATON G. DUCKWORTH, District Judge, 26th Judicial District, IRL SHUTTS, and ROBERT ANDERSON and BETTY ANDERSON, individually, and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770, and 770A,
Respondents.

REPLY OF PHILLIPS PETROLEUM COMPANY

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Date: October 29, 1982

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Respondents.

REPLY OF PHILLIPS PETROLEUM COMPANY

In their Brief in Opposition, Respondents have undertaken to cloud the issues by making a variety of unsupported charges against Phillips. In their Brief in Opposition, Respondents state that Phillips was "flagrantly violating a State Supreme Court order" by failing to pay interest on suspended royalties. This statement is untrue. Never has Phillips been ordered, as the Respondents claim, to pay interest on the suspended royalties involved in this case. While there is law in Kansas which under certain circumstances would entitle royalty owners to collect interest on suspended royalties, no injunctive relief has ever been issued as a remedy for not paying royalties. At no time has any declaratory relief been entered which would require Phillips to pay these royalties. Under these facts,

the present situation cannot be twisted into the shape of a court having the power to enforce its injunctive orders.

The Respondents also attempt to disparage what they see as a "divide and conquer" approach to this litigation by Phillips. Respondents apparently do not appreciate the nature of the adversary system which allows a defendant to raise defenses to an action. Respondents do not appreciate the important rights inherent in procedural protections Phillips is attempting to invoke. As can be seen by the attempt of Respondents to prejudge the outcome of this action, without any consideration of the defenses asserted by Phillips, the Respondents have adopted the attitude that the end justifies the means.

Respondents have raised one issue which bears upon the question presented by the Petitioner. Respondents question the standing of Petitioner to raise the Fourteenth Amendment claim. This reply brief is addressed to this newly raised issue.

I. Phillips Can Properly Raise The Fourteenth Amendment Issues

A. Phillips Can Properly Question the Jurisdiction Over Non-Resident Plaintiff Class Members.

In their brief in opposition, Respondents raise for the first time the question of whether Petitioner, Phillips Petroleum Company, has standing to litigate the issue of the existence of jurisdiction over a non-resident unnamed plaintiff class member. Respondents argue that Respondents' counsel, as counsel for the class, now properly represents these unnamed class members, and only class counsel can object to the propriety of jurisdiction over these class members.

The Respondents' position assumes that the due process issue has been resolved in their favor. Only if this

Court finds that the Kansas courts can exercise jurisdiction over these unnamed class members can the class counsel appropriately raise an objection on their behalf. Only if the Kansas courts have the power to compel a non-resident to respond to court process or be bound by a resulting judicial determination can the failure of non-residents to respond be seen as an election to be bound by the result. These are the issues which Phillips raises as issues to be resolved by this Court. The Respondents assume these issues have been resolved in their favor.

In any event, it is clear that Phillips has the right to challenge the jurisdiction over these non-resident plaintiffs. In *Hanson v. Denckla*, 357 U.S. 235, 245 (1958) this Court held that where a court could not proceed with a lawsuit without the presence of a non-resident, "any defendant affected by the court's judgment has that 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired." *Quoting, Chicago v. Atchison, T&S.F.R. Co.*, 357 U.S. 77 (1958). Clearly, the presence of these non-resident plaintiffs is necessary in order to issue a judgment binding upon them.

Phillips has the same interest as the defendant in *Hanson v. Denckla*. If the decision of the Kansas Supreme Court is upheld, Phillips will be forced to litigate approximately 30,000 claims, while knowing that current law in certain states renders it unlikely that a judgment in favor of Phillips would be given full faith and credit. This circumstance provides Phillips the necessary personal stake in the controversy so as to allow it to raise and litigate the constitutional issues.

Phillips can thus question jurisdiction of the Kansas state courts over these unnamed class members.

B. Asserting Jurisdiction Over Phillips to Decide the Claims of Non-Resident Class Plaintiffs Directly Implicates Phillips' Constitutional Rights.

The Respondents state: "No Question is asserted as to the jurisdiction of the trial court or the (Kansas) Supreme Court over Phillips or the trial court's power to enforce a judgment against Phillips." Brief in Opposition, p. 7. This statement is untrue.

Respondents argue that Kansas courts have the power to enforce a judgment against Phillips. Neither the presence of this power nor the willingness of these Kansas courts to exercise this power can be challenged. Phillips, however, disputes the propriety of the exercise of this power in this dispute.

Phillips directly asserts that the due process clause prohibits Kansas from binding Phillips on claims of non-residents which claims arose outside of Kansas. The constitutional protections afforded non-resident defendants are clearly available to this non-resident defendant.

Phillips has its own due process interest in insuring that an interested forum hears and decides the case. Phillips has an interest in insuring the orderly administration of justice by having important unsettled legal issues decided by courts of the states in which these issues are undecided. Phillips has an interest in insuring that the Kansas courts will not overstep their role as courts of co-equal sovereigns, so as to impose requirements on Phillips which are contrary to the laws of other states.

All of these interests can be insured by adhering to the requirement that personal jurisdiction over a defendant is proper only where there is a sufficient nexus "among the defendant, the forum, and the litigation." *Rush v.*

Savchuk, 444 U.S. 320, 327 (1980). With respect to the claim of non-resident class members, there is no nexus among the defendant, the forum and the litigation, other than that which has been created by the court sponsored notice of class action.

It is the sufficiency of this relationship which Phillips is seeking to have reviewed by this Court. Phillips properly has standing to address and litigate these issues.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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